

Sam^l THE Harrops
CASE
O F
ALLEGIANCE
T O A
K I N G
I N
POSSESSION.

[Thomas Brownell H. 1. 3. 1.]

Printed in the Year, 1690.

THE
CASE

OF

THE

OF

THE

IN

FOR

Printed in the Year, 1830.

THE
CASE of ALLEGIANCE
TO A
KING
IN
POSSESSION.

BY the *King in Possession* may be meant, First, The Person who is invested with the Regal Authority. Secondly, The Person who has the exercise of the Government in his Hands. The King in Possession in the former Sense, is only the *King de Jure*, i. e. he that has the true Right and Title to the Crown; for he is immediately invested with the Regal Authority upon the Death of his Predecessor, before he is either Crowned or Proclaimed; and though he be excluded or deposed from the exercise of the Government by a Rebellion or Usurpation, yet he is not thereupon devested of his Authority.

But the Question is of the *King in Possession* in the other Sense, viz. the Person who has the exercise of the Government in his hands: Whether though he be not *King de Jure* but an Usurper, and so has not the Regal Authority, yet in as much as he has the execution of the Kingly Office, the Subjects are bound to bear Faith and Allegiance to him. To state which Question exactly,

A

First,

First, It is not meant of this case, namely, where there is *No Person surviving* who has the *Right* to the Crown; as suppose in an Hereditary Monarchy the whole Royal Line were *Extinct*: Because here there is no dispute but the subjects may, and ought to bear Faith and true Allegiance to the *King in Possession*, though he came in at first by *Usurpation*: For the whole Royal Line being *Extinct*, the Subjects are at liberty to give themselves up to the *Usurper* and his Line; and this it may be their Duty to do, to prevent that Bloodshed and Confusion which may follow upon their attending to set up another Person or Government; and when they have thus given themselves up to the *Usurper*, he becomes from thenceforth *King de Jure*, and all Faith and Allegiance becomes due to him. V. *Sanderſon de Conſcient. Pract. 5. Sect. 13. 14.*

Secondly, Neither is the Question meant of this case, where there is one or more who pretend a Title to the Crown, besides the Possessor, but it is not clear who has the true *Right* and *Title*: For here also it is not disputed but the Subjects, while they don't know who has the *Right*, are to pay their Allegiance to the *King in Possession*; and the Reason is not barely because he is King in Possession, but because he being in Possession, and no better Title appearing, his Title is presumed to be Just and Lawful, and so he is supposed to be King not only *de Facto*, but *de Jure*, till it do appear that some other Person has a better Right to the Crown. And this, according to the old Rule, *in Rebus Dubiis melior est Conditiō Possidentis*. V. *Sanderſon de Cont. Prae 5. Sect. 15.* But,

Thirdly, The Question is properly meant of this Case, where a King, whose Right to the Crown is clear and undoubted, is Excluded or Deposed by an Usurper: Whether then the Subjects are to bear Faith and Allegiance to the Usurper, as *King in Possession*; and here it may be granted,

1. That the Subjects may lawfully pay a Submission and Obedience under the Usurper, as to all those Acts of Government which tend to the Preservation and Welfare of Community, and are not *destructive* of the *King de Jure's* Rights and Interest; as for instance, The *Laws* made by the Usurper for the publick Good, the *defence* of the Nation against a Foreign Invasion (not made in behalf of the *King de Jure*) the execution of *Justice*, *Trade*, &c. They may lawfully submit to, and obey these Acts of Government under the Usurper, because

cause this is *no renouncing* of their Allegiance to their *lawful* King, nor acting against his *real* Interest; but is consistent with their acting still, all that they are capable to do, in the present circumstances, for the restoring of their *lawful King*, and dethroning the Usurper. Nay, they may be obliged in *Duty* to pay an Obedience to the Acts of the Usurper, in things of this Nature; not by virtue of any Authority in the Usurper, but, First, For their own Safety and Advantage. Secondly, For the good of the Community. Thirdly, Because these Acts of Government, done by the Usurper, are ratified by the Authority of the lawful King, he being to be presumed to Will and Consent to whatever is done for the publick Good, and not against his own Interest, though done by his Enemy, *U. Sanders de Conscient. Præl. § Sect. 17, 18, &c.* He adds another Ground of this Obligation, the *Protection* the Subjects have from the Usurper; but I think this lays no obligation upon them, but in point of *Prudence* for their own Safety; for they cannot be obliged to him in *Justice* or *Gratitude* for his Protection, who deprives them of a more *legal* Protection from their rightful King.

Secondly, Neither is it disputed, but the Subjects (while they have not *number* or *force* to oppose the Usurper) may *sit down quietly*, and not make any *resistance* against such Acts of Government, as are contrary to the Right and Interest of their lawful King, because their making any opposition without sufficient Force would be only to throw away their Lives, and lose the King *de Jure* to many Loyal Subjects, who might be ready to act for his Service upon a fair opportunity. But,

Thirdly, The point in dispute is, whether the Subjects may and ought to pay a *full* and *entire* Submission and Obedience to the Usurper; so as never to attempt any thing against him while he is in Possession *in behalf of the King de Jure*, upon the fairest occasion; but on the contrary to *stand by him, even against the King de Jure himself, with their Lives and Fortunes.*

The Affirmative is maintained now upon these Grounds.

First, The Authority of our greatest Lawvers, who make Treason to be only against the King in *Possession*, whether he be King *de Jure* or no, and not against a King *out of Possession*, though he be the King *de Jure*.

A 2

Secondly,

Secondly, The Statute (11 H. 7. c. 1.) which makes the Allegiance of the Subjects due to the King *for the time being*.

First, The Authority of our Lawyers. The Lawyers quoted for this Opinion are the Lords Chief Justices, *Coke, Hale, &c.* The Lord Chief Justice *Hale* says it in his *Pleas of the Crown* p. 12. But then it is much doubted whether *that Piece be his*: and he himself may be justly looked upon to be of another Opinion in this point; because he would never be brought to try any (a) Treasons, or other Offences against the State, when he was Judge under *Oliver Cromwel*.

(a) See his Life, by Dr. Burnet, p. 36, &c.

My Lord *Coke* says it in his *Institut*. Part 3d. p. 7. in his Comment upon the Words [*Seignior le Roy*] in the Statute of Treason (25 Edw. 3. c. 2.) by which Words he says is to be understood the King in Possession, though he be King *de Facto* and not *de Jure*, and not the King out of Possession, though he be the King *de Jure*.

The Acts declared Treason in that Statute are, To compass the Death of the King, Queen, or Prince: To Ravish the Queen, or the King's Eldest Daughter, or the Prince's Wife. To Levy War against the King, or to be adherent to his Enemies, giving them aid or comfort: To Counterfeit the Great or the Privy Seal, or the King's Coin: To kill the Chancellor, Treasurer, Judges, &c. in the Execution of their Office. The sense therefore of my Lord *Coke's* Assertion is, That these Acts are Treason when they are committed against a King in Possession, whether he be King *de Jure* or no; and not Treason when they are committed against a King out of Possession, though he be King *de Jure*.

Before I examine the grounds of his Assertion, I shall first state the point of Controversy. The Question therefore is not, Whether some of these Acts may not be punished as Treason under an Usurper; if they are committed against the necessary Order of Government, and not done for the restoring of the King *de Jure* to his Crown, or promoting his Interest: For the Subjects are obliged to pay a Submission and Obedience to the Usurper, as to all Acts of Government that are not destructive of the King *de Jure's* Rights and Interest, and therefore if herein they oppose or disturb the Government, they may by the Law be adjudged Traitors, and punished as such. Thus therefore it may be Treason under an Usurper.

First, To Counterfeit or Clip his Coin, or to Counterfeit his Broad Seal, or Privy Seal, or to kill a Judge sitting upon the Bench; for these

these Offences touch not the Person or Interest of the Usurper but the Order of Government: and as it is just that the Order of Government should proceed under an Usurper, so it is just that these Acts against the Government should be punished, as well as Robbery, Murder, and the like, as Offences not against the Usurper, but the *Lawful King*.

Secondly, *To Levy War against him, or to be adherent to his Enemies, or to compass his Death*, out of a private seditious Principle, and not out of any regard to the Right and Interest of the *Lawful King*; as suppose any Man should practice with a Forreign Prince to Invade the Nation, (not in the *Lawful King's* behalf,) or should betray any Fort or Castle, or any part of the Country to him, or the like; for these also are Offences not so much against the Person and Interest of the Usurper, as against the course of the Government, and strike (through the Person of the Usurper) at the Person and Authority of the *Lawful King*; and in that regard may be justly looked upon and punished as Treason. So the Swearing falsely, though by an *Idol*, may be looked upon and punished as *Perjury*, because it terminates upon the Majesty of the true God.

But all this may be granted, and yet it does not follow that the *Allegiance* of the Subjects ought or may be paid to the *King in Possession*, if he be an *Usurper*; for still their Submission and Obedience to him is limited with a reserve to the Right and Interest of the *Lawful King*. The Question therefore must be, Whether it be Treason to act against the *Usurper in Possession*, for the Right and Interest of the *King de Jure out of Possession*, to be adherent to the *King de Jure*, to give him and his Party Aid and Comfort, and to Levy War against the Usurper, for the restoring of the *King de Jure* to his Crown? And whether it is not Treason to be adherent to the *Usurper, and to Fight for him against the King de Jure out of Possession*? This therefore must be that which my Lord Coke lays down for Law, where he Asserts that *Treason lies only against the King in Possession*. I shall proceed therefore to consider the grounds of his Assertion.

It is indeed true in *Fact*, that the Acts declared to be Treason in the Statute 25 *Edw. 3.* will be adjudged and punished as Treason under every *King in Possession*, whether he be *King de Jure* or no; for though he be an *Usurper*, yet while he is in the

the Throne, the *Laws*, *Courts of Judicature*, and every thing else is made to favour his side, as much as if he were the most *Lawful and Rightful King*. His Party are held to be the *Loyal Subjects* in the Eye of the Law, and the adverse Party *Rebels and Traytors*. So the *Laws* may be fitly compared to the *Banks* cast up against the Sea, which are made to *keep out an Inundation*, but when once the Water is got over them, *they keep it in*: In like manner the *Laws* are made to *prevent an Usurpation*, but when once an Usurper is got into the Throne, then they are made to become a *Fence* to him to *keep in Possession* of it. Now there is hardly any *Monarchy* wherein there have been more Usurpations than there have been in *Ours*; and it ought not to be strange if in all these the Usurpers took upon them to act as *Lawful Kings*, and Obedience was paid to them as such by the Major part of the Nation, at least, while they continued in the Throne; and those that stood by them (against the King *de Jure* whose Rights they had Usurped) were looked upon as *Faithful and Loyal Subjects*, and rewarded accordingly; and those that rose up against them (in behalf of their *Rightful Kings*) were declared *Traytors and Rebels*, and punished as such; and so the whole course of the Government ran on their side. They called *Parliaments*, and then the *Laws* were made in favour of their Title; they made the *Judges*, and no wonder then if *all the Laws*, as well as the Stat. 25. Edw. 3. were interpreted in their Favour, and *Treason* lay in their own Courts against them only.

But its being always thus *in Fact*, is no just Ground for any Man to declare it to be so *in point of Right*, and to give it for *Law* that *Treason is only against the King in Possession*, whether he be the King *de Jure*, or an *Usurper*. We may therefore take leave to examine whether there be any better Grounds for this Assertion.

It would seem a very odd Question for any to ask, touching the *Laws* which are made in any settled *Monarchy* for the defence of the King's Person, Crown, and Dignity, who is meant by the King in those Laws? The *Lawful and Rightful King* of that Realm, or any one that gets into the Possession of the Throne, though he be not the *Rightful King* but an *Usurper*? *Common Sense* would hardly allow such a Question to be put: For the King *de Jure*, and not an *Usurper*, is *Truly and Properly*

by King, and therefore (if the Words of a Law are to be understood in their *Natural* and *Proper Sense*) the Word *King* cannot be understood to mean an Usurper, unless with an *express limitation* to determine it to that Sense. Besides, the Law is made for the *defence of Rights*, and therefore cannot be understood to be designed for the *Security and Settlement* of an Usurpation, but made to *prevent it*.

I granted *above*, That there may be *some* Acts committed against the Person and Government of an Usurper, which the Law may justly condemn and punish as *Treason*; as *swearing falsely* by an *Idol* may be justly looked upon as *Perjury*, and will by the *true God* himself be punished as such. But if (because some Acts against an Usurper may be punished as *Treason*) a *Lawyer* may make this *comment* upon the Statute of *Treason*, that by [our Lord the King] is meant only the *King in Possession* whether he be *King de Jure* or no; I think a *Divine* (upon the other Ground that *swearing falsely* by an *Idol* may be punished as *Perjury*) may as well make this *gloss* upon the *Third Commandment*, that by [*the Lord thy God*] is meant there the *God in Possession*, he that is *Worshiped* in the Land, whether he be the *true God* or not. But to shew what are my Lord *Coke's* Grounds for his *gloss*, I shall set it down in his own Words, with the references he makes in the Margin to the *Statutes* and *Year Books* of our *Law Cases*.

This Act is to be understood of a King in Possession of the Crown and Kingdom: for if there be a King regnant in Possession, though he be Rex de Facto & non de Jure, yet he is Seigneur le Roy within the purview of this Statute: And the other that hath Right, and is out of Possession is not within the Act: Nay if Treason be committed against a King de Facto, and after the King de Jure cometh to the Crown, he shall punish the Treason done to the King de Facto: And a Pardon granted by a King de Jure, that is not also de Facto is void.

We may Observe here First, this *Gloss* is not grounded upon the Act it self; for that says only *Seigneur le Roy*, which Words my Lord *Coke* interprets of the *King in Possession*, be he *King de Jure* or no. Nay it is plain that the Act does intend only the *King de Jure*, if we consider the other Parts of it. For First, it's *Treason* by the Act to kill the *Prince*, the *King's Eldest Son*, and *Heir Apparent* to the Crown, (and

V. 11 H. 7.

C. 1.

4 E. 4. 1.

9 E. 4. 1. 2.

(and it is plain the Reason of the *Law* in this has its care for the *Succession*) Now the *Heir Apparent* of the Crown cannot be the *Son* of an *Usurper*; for this implies a *Right to Succeed* after his *Father*, but the *Son* of an *Usurper*, though his *Father* be in *Possession* of the Crown, has no *Right of Succession*. If therefore by the *Prince* here cannot be meant the *Son* of an *Usurper*, though *King de Facto*, then it must be *only* the *Son* of the *King de Jure*; and consequently by parity of Reason, by the *King* in the Statute must be meant *only* the *King de Jure*.

(a) *Instit.*
Par. 3. p. 9.

Secondly, It is Treason by the Statute to *violate or Ravish the Queen, or the Prince's Wife*, and this also is grounded upon the care the *Law* has to preserve the true *Right of Succession*; and it is Treason likewise to *Ravish the King's Eldest Daughter*; and let my Lord Coke himself give the Reason, because (a) for *defaults of Male Issue she only is Inheritable to the Crown*. Now the *Law* cannot be supposed to be thus concerned for the *Issue* of an *Usurper*, who have no *Right to Inherit the Crown*; though we might suppose the *Law* were willing to maintain the *Usurper himself* in *Possession* of the Crown for his own *Life*; these instances therefore are a farther proof, that the Statute it self had an Eye only upon the *Lawful King*, and never intended any such kindness to an *Usurper*, as to oblige the Subjects to stand by him on pain of being guilty of *Treason* if they did otherwise.

And if the Stat. 25 E. 3. c. 2. Which is *only a Declaration* of what was Treason Originally by the *Common Law*, be not applicable to a *King in Possession*, if not *de Jure*; then (besides the *Vindication* of the Statute it self from my Lord Coke's Gloss) we have gained another very material point, viz. That Treason did not then, by the *Common Law*, lie against the *King in Possession*, if he were not *King de Jure*.

Secondly, We may Observe that the Lord Chief Justice Coke does not found his Gloss upon the *Fundamental Constitution* of the Realm; and indeed that makes flatly against him. *England* is a *settled Monarchy*, and in every such Monarchy the *Right to the Crown* is always vested in some certain Person, who is the *Rightful and Lawful King*; and to this Person the *Fundamental Constitution* appropriates the *Regal Authority*, and the *Allegiance* of the Subjects, and consequently they cannot properly be guilty of *violating their Allegiance* but

but against him only: For the Constitution of the Realm makes him King and no other, and makes them Subjects to him and to none other; and therefore in strictness of Law Treason ought to lye against him only and no other, at least it ought not to lye against any other, but in such case wherein the Offences against another Person terminate upon the Lawful Kings Authority, and are destructive of his Interest, and so are punishable by vertue of his presumed Will and Consent.

Thirdly, Neither is my Lord Coke's gloss grounded upon the constant Practice and Custom of the Realm, but that also proves the contrary. For if Treason, by the Practice and Custom of the Realm, lay only against a King in Possession of the Crown and Kingdom, then

(1.) Those only would be attainted by our Kings and Parliaments who acted against a King in Possession; but we shall find, the contrary always practiced. We shall find that all our Kings, whether lawful or not, with their Parliaments, have attainted those acted against them; but then they have not only attainted those that acted against them, while they were in Possession, but those also that opposed their obtaining or recovering the Possession of the Crown, and acted against them under another King in Possession. And this we shall find in every instance where any of our Kings came into the Possession of the Crown, not without a violent Opposition made against him by the adherents of another King whom he deposed. So Ed. 4. in his First Parliament (b) attains those that fought for Hen. 6. against him: And Hen. 6. when Nine years after, Ed. 4. fled out of the Realm, and he was again restored to the Crown, calls a Parliament and (c) attains those that acted for King Ed. against him: And again when Ed. 4. returned and deposed King Hen. a Second time; then Ed. 4. in his next Parliament (d) attains those that had acted against him on King Henry's side. So also Hen. 7. himself (e) attainted by Parliament those that fought against him under Rich. 3. in Bosworth-field. And Queen Mary first convicted, and then in her First Parliament (f) attainted the Duke of Northumberland, &c. for acting for Queen Jane against her. Now their attainting those that opposed their obtaining or recovering the Possession of the Crown, shews that they did not attaint them of Treason as acting against a King in Possession.

B

but

(b) Exact Abridg. of the Records of the Tower 1 Ed. 4. n. 20. 24.
(c) Trussell's Continuat. of Daniel's Hist. p. 189. Stat. 17. Ed. 4. c. 7.
(d) Abridg. of the Records 14 Ed. 4. n. 34. 35. 36.
(e) See a large Catalogue of their names in Baker's Chr. in the beginning of the life of Hen. 7.
(f) 1 Mar. Sess. 2. c. 16.

(g) Abridg. of the Records 4 Ed. 3. n. 5. but as acting against a *King de Jure*, whether in Possession or out of it. I might add that in the Parliament 4 Ed. 3. the Murderers of Ed. 2. (g) a *King Deposed* and out of Possession,

are *Attainted* of Treason: But here my Lord Coke (h) says something which may take of the force of the Argument, viz. that this was Treason not as Ed. 2. had been once *King*, but as he was the *Father* of the *King Regnant* and that upon the same ground the Murderers of *Edmond Earl of Kent* were *Attainted* of Treason by the same Parliament, be-

(h) Coke's Institut. part 3d. p. 7. He says it was Treason before the Stat. 25. Ed. 3. to kill the King's Father or Uncle, but that the Statute restrained it to the killing the King, Queen, or Prince.

cause he was the *King's Uncle*.

(2.) If Treason by the Practice and Custom of the Realm lay only against the *King in Possession*, then certainly a *King in Possession* himself cannot be guilty of Treason for what he does while in Possession, much less can be guilty for what he does against a *King out of Possession*; and yet we shall find the very *Kings* themselves who are looked upon as Usurpers, as well as their adherents, attainted or declared guilty of Treason by the subsequent Kings and Parliaments. So in the Parliament 1 Ed. 4. King Hen. 4. himself is declared a Traytor, for putting to Death Rich. 2. after Richard was Deposed, and Hen. himself was in full Possession of the Crown. The words are

(i) Rot. Parl. 1. Ed. 4. n. 9. in Dr. Brady's Hist. of the Succession (Printed for Cave Pulleyn 1681.) p. 30. Year Books. 9 Ed. 4. 9. (i) Henry Earl of Derby against his Faith and Ligeance reared War at Flint in Wales against the said King Rich. 2. him took and Imprisoned in the Tower of London of great violence. And the same King Richard so being in Prison and living, usurped and intruded upon the Royal Power, Estate, Dignity, — taking upon himself the name of King, and Lord of the same Realm. And not therewith satisfied or content, but more grievous things attempting wickedly, of unnatural unmanly and cruel Tyranny, the same King Richard Anointed, Crowned, and Consecrated, and his Liege and most high Lord in the Earth, against God's Law, Man's Legiance and Oath of fidelity with the uttermost punishment tormenting, Murdered and destroyed with most vile, heinous and lamentable Death, &c.

(k) Abridg. of the Records 1 Ed. 4. n. 17, 21, 22, 23, 24. Besides in the same Parliament 1 Ed. 4. Hen. 6. (k) is several times *Attainted*; first for the Death of Richard Duke of York at the Battle of Wakefield: then for delivering up Berwick to the King of Scots and procuring him to Invade England, and practicing to deliver up Carlisle to him; and lastly for being in

in Arms against *Ed. 4.* in the *Bishoprick of Durham*: all which Treasons were committed before *King Edwards Coronation*, and so before he was King in full Possession; and the first Treason lies against *Richard Duke of York*, who was not King, but only Declared Heir to the Crown, 39 *Hen. 6.* by (1) Agreement (1) Abridg. of between *Hen. 6.* and the Duke, that *Henry* should be King for the Records his Life and the Duke after him; which Agreement though it left *Hen. 6.* still King in Possession, yet it seems he was judged liable to an Attainder of Treason, for fighting against the Person that had the Right Title to the Crown. 39 *Hen. 6. n.* 20. 22.

Neither did *Hen. 6.* when he was again Restored to the Crown, Attaint only the adherents of *Ed. 4.* but (m) himself (m) Trussell's Continuation of Daniel's Hist. p. 189. also. And in like manner *Hen. 7.* with his Parliament Attainted (n) King Rich. 3. for being in Arms against *Hen. 7.* in Bosworth Field. So also did *Queen Mary* Attaint (o) *Queen Jane* Stat. 17 *Ed. 4.* for Usurping her Crown. Now if we reflect upon these Proceedings of our Kings and Parliaments, that they always c. 7. Attainted those Kings whom they looked upon as Usurpers, it (n) Baker's Chron. in the beginning of the Life of *H. 7.* plainly follows that they proceeded upon this Principle, that our Law allows of no other King but a King de Jure: and therefore when an Usurper gets into Possession of the Crown; though while he has the Laws in his Power they must seem (o) 1 Mar. Sess. 2. c. 17. to be of his side, yet when once the Government is free it looks upon him as no King, but considers him as a Subject of, and a Rebel and (p) Traitor against the King de Jure. For (p) Stat. 17. *Ed. 4. c. 17.* if an Usurper were truly King he could not then be guilty of there *H. 6.* is called a Rebel against *Ed. 4.* Treason, except against himself; so that if there be a Person against whom the Law makes him a Rebel and Traitor; then it follows that the Law looks upon that Person only as King, and the Usurper as still his Subject, though King in Possession.

Thirdly, If Treason lay only against the King in Possession whether King de Jure or no: then when once there is an Usurper got into the Throne, the Subjects must look upon themselves as obliged upon pain of High Treason not to admit of any claim of the King de Jure, nor to attempt to bring him into Possession of his Right during the Usurpers Life, though they are fully convinced in their Consciences of his just Title to the Crown: for this were to be adherent to the Enemy of the King in Possession. But this notion of their Duty to the King in Possession it appears the Nation had not formerly, from the Case of *Richard Duke of York*, when he came to put

(q) Abridg.
of the Records
39 H. 6. n. 10.
& seq. Rot.
Parl. 39. H. 6.
n. 11, 12, &
seq. in Dr. Brady's
Hist. of the
Succession
p. 26.

in his *claim* to the Crown, in the *Parliament* 39 Hen. 6. (q) The *Lords* in that Parliament alledge against the *Duke's claim* all that King *Henry's Council* could suggest to them in behalf of a *King in Possession*: As first, that they had all taken an *Oath of Allegiance* to King Hen. 6. then; that the *Crown* was *entailed* upon the *Heirs Males* of Hen. 4. by *Act of Parliament*, &c. To which the *Duke of York* Answers, That neither their *Oaths*, nor the *Act of entail*, were of any force or effect to the suppression of *Truth and Right*, against him that is *Right Inheritour* of the same *Corones*, &c. And the *Lords* upon consideration of his Answer, conclude and agree, That his *Title* could not be defeated. Now if by the *Law and Custom* of *England*, *Treason* lay against the *King in Possession* only whether *King de Jure* or not, and the *Allegiance* of the *Nation* were due to him only; then it had been a *sufficient Answer* to the *Duke's claim*, to tell him that though his *Title* were *Good*, and the *Right of Blood* inherent in him, yet at that time Hen. 6. was *King in Possession*, to whom alone their *Allegiance* was due thereupon by the *Law of the Land*, even though they had not taken an *Oath to him*, and that they could not lay him aside and admit the *Duke* into the *Possession* of the *Crown*, without incurring the *Guilt and Penalty of High Treason*. This I say had been a more clear and *effectual Answer* to the *Duke*, to debar him, at least, from giving *King Henry*, the present *Possessor*, any disturbance; but neither *Lords* nor the *King's Council* seem to know any thing of this, but urge only the *Oaths* they had taken as a ground of their *Allegiance* being due to *King Henry*, and admit that even their *Oaths* were null and void, as they tended to the suppression of the *Right of the Heir to the Crown*.

It may be objected, That the *Lords* did not hereupon depose Hen. 6. but continued him in *Possession* for his life, and declared the *Duke* the next *Heir*. They did so, but it is plain they did it not as of *Right*, but by *Vertue* of the *Duke's consenting and agreeing* to it: The express Words in the *Records* are, (r) For eschuying the great inconvenients, that may ensue, a mean was found to save the *King's Honour and Estate*, and to appease the said *Duke*, if he would; viz. That the *King* should enjoy the *Crown* during life, the *Duke* to be declared the true *Heir*, and to possess it after his death, &c.

Fourthly, If *Treason* lay only against the *King in Possession*, whether

(r) Rot. Parl.
39 H. 6. n. 18.
in Dr. Brady's
Hist. of the
Succession
p. 27.

whether King *de Jure* or no; then the Law, in other regards would look upon the King in Possession, as having the Dignity and Authority of a King, as well as it does in this point, that it makes Treason to lye against him: But we find the Law does not so regard the Kings in Possession, when it considers them as Usurpers and not Kings *de Jure*. As,

First, The Law, where it considers them as Usurpers, does hardly vouchsafe them the Name of King. So in the Statute 1 Ed. 4. above cited, Hen. 4. wherever he is mentioned is called not by the Name of King Henry, but (f) Henry Earl (f) Year Book of Derby. And the same Act speaking of Hen. 5. 6. styles 9 Ed. 4. 9. them Henry late called King Henry 5. and Henry late called King Henry 6. And in that part of it where their judicial Acts and Grants are Confirmed; they are called all along the late (t) (t) Stat. 1 Ed. pretended Kings, and Kings indeed and not in Right, and their 4. c. 1. Reigns their pretended Reigns. And the Stat. 17 Ed. 4. * made * c. 7. to annul the Parliament 49 H. 6. called by Hen. 6. when Ed. 4. was fled out of the Realm, styles that Parliament a pretended Parliament unlawfully and by Usurped Power summoned by the Rebel and Enemy to our Sovereign Lord the King, Hen. 6. late indeed and not of right King of England. So also the Statute 1 Hen. 7. c. 6. (though it was made by that very King who afterwards pretends so much to be due to the King in Possession) where it speaks of Rich. 3. calls him only Richard Duke of Gloucester, as if he had never worn the Crown. And the Stat. 1 Mar. (u) where it Confirms the Recognizances, (u) Sefs. 2. Bonds, &c. which were dated as made in the Reign of Queen c. 4. Jane, calls her only the Lady Jane Dudley Wife of Guilford Dudley Esq; otherwise called the Lady Jane Grey: and afterwards (w) where it Attaints her with her Husband, and the (w) c. 16. Duke of Northumberland, &c. it names her with no more ceremony then barely placing her next to her Husband, Guilford Dudley Esq; and Jane his Wife. Now these Statutes speaking thus of those our Kings whom they consider as Usurpers, shews that our Law has no regard to an Usurper, though King in Possession, but looks upon him as no King: And yet this is very well consistent with other Statutes giving these Usurpers the name of King, where they are considered not with a regard to their Usurpation; but with regard to their having the Execution of the Kingly Office, and to some necessary and beneficial Acts of Government done by them.

Secondly,

Secondly, The Law does not look upon the *Acts* of Government done by a King in Possession, if an Usurper, as valid and authoritative in themselves. This is fully and clearly proved by the Statute 1 E. 4. c. 1. (that part of it which is printed in the Statute Book) the business whereof is To confirm the judicial *Acts* of Hen 4, 5, 6. and all Processes during their Reigns, and several of their Grants, and Letters Patents, &c. And the Style wherein it confirms them (which is repeated at the end of every particular head of Judicial *Acts*, Processes, Grants, &c.) is, by enacting, That they shall be of the same force and vertue as if they had been made by any King lawfully Reigning in this Realm, and obtaining the Crown of the same by a just Title. This supposes that they looked upon them as not having in themselves the same force and vertue, as if they had been made by lawful Kings; and yet they ought to have had the same force and vertue, if the Law makes the King in Possession King to all intents and purposes of Government while he is in Possession, whether he be King de Jure or not. The same is further proved from the Stat. 1 Mar. Sess. 2. c. 4. the business whereof is to confirm the Recognizances, Indentures, Bonds, Patents, &c. made with Queen Jane's Name in the date of them during her short Reign; which it does by enacting, That they shall be as good and effectual, as if Queen Mary's Name were expressly contained in them; I do not say that these Recognizances under Queen Jane, and the Judicial *Acts*, Processes, &c. of Hen. 4, 5, 6. ought to have been looked upon as invalid without this confirmation, but though they might have stood good without it, yet that would not have been by vertue of any Authority in these Kings, but upon account of the necessity of Government, and the presumed consent of the Kings de Jure excluded from their Right.

It may be Objected that the *Acts* of Parliament made by Hen. 4, 5, 6. were not confirmed by the Parliament, 1 Ed. 4. therefore it may be concluded that that Parliament looked upon the Statutes made by an Usurper and his Parliament as good and effectual, without the Confirmation of a King de Jure. I Answer, There are some of their *Acts* of Parliament confirmed there, viz. any *Acts* made by them for the founding any Abbeys, Religious Houses, &c. And any made for the Town of Shrewsbury: and though the rest of their *Acts* of Parliament might be

be looked upon as *valid* without *confirmation* of *Ed. 4.* yet their being looked upon as *valid* is not to be ascribed to any *Authority* in a *King de Facto* sufficient to make them so. For then that *Authority* must have had the *same effect* in all their other *Acts of Government* (their *judicial Acts*, *Grants*, *Letters*, *Patents*, &c.) as it had in the *Statutes* made in the *Parliaments* holden by them.

These instances from our *Statutes* and *Records* of *Parliament* may be sufficient to prove (the contrary to what my Lord *Coke* gives for Law) viz. *That Treason does not lye only against the King in Possession*, whether *King de Jure* or no: I come therefore now to consider his proofs of his Assertion.

We have in his note upon the words *Seignior le Roy* in the *Statute* of *Treasons*, first his *main Assertion*, That by those words is meant the *King in Possession* only, though he be *de Facto* and not *de Jure*, and not the *King out of Possession* though *de Jure*: and for the proof of this he refers us in the *Margin* to the *Stat. 11. H. 7. c. 1.* Secondly, We have some other *points of Law*, which he brings to *Illustrate* and *Confirm* his main position; viz. *That Treason against a King de Facto is punishable by the King de Jure when he comes to the Crown.* And *That a Pardon granted by a King de Jure, that is not also de Facto, is void*: and for the proof of these he refers to the *Year-Books* of *Law Cases* 4 *Ed. 4. 1.* and 9 *Ed. 4. 1. 2.*

The *Stat. 11. H. 7. c. 1.* which he refers to for his main position, I have set down before as a *distinct Argument*; from whence it is inferred, that *Allegiance is due to the King in Possession*; and therefore I shall consider it *apart* in its proper place, and consider here my Lord *Coke's Secondary Points*, *That Treason against a King de Facto is punishable by the King de Jure, when he comes to the Crown*; and *a Pardon granted by a King de Jure out of Possession, is void*. And they are rather to be considered first; because if they are sufficient to prove that *Treason* lies against a *King in Possession* only, they prove that it did so by the *Common Law* before the *Statute* of *Hen. 7.* and so overthrow all that has been alledged above to the contrary. My Lord *Coke's* references for the proof of these points are to the 4 *Ed. 4. 1.* and 9 *Ed. 4. 1. 2.* in the *Year-Books*. Under the first I find nothing of this *Nature* and have some reason to think it is but one and the same with the latter: but under the latter reference I find a *Plea* in the Case of *one Bagot* and

and to clear that Plea shall set down a short History of his Case.
 (x) 7 E. 4. 29. This Bagott and one Shyrenden were (x) disseized of the place
 9 E. 4. 6. of Clerk of the Crown by one Iwe, and thereupon sue him.
 Iwe's Plea against Bagott is, That he was an Alien born in Nor-

(y) 7 E. 4. 31. leige Subject. Bagott brings a (y) Patent of Naturalization
 9 E. 4. 7. granted him by Hen. 6. to which Iwe's Council object, That
 Hen. 6. was only a King de Facto, and not de Jure, and that
 Ed. 4. the King de Jure, had in his First Parliament declared
 what Grants of Hen. 4. 5, 6. Kings de Facto should be valid,
 and had not there made any provision to ratify any such
 Grants as Bagott's Patent was, therefore his Patent was null.

(z) 9 E. 4. 1. To this Bagott's Council Answer, (z) That notwithstanding
 that Act of Ed. 4. in his First Parliament, Hen. 6. Letters Patents
 were good, because Hen. 6. was King in Possession, and it is con-
 venient that the Realm have a King, under whom the Laws shall
 be upheld and maintained: Therefore though he were not King but
 only by Usurpation, yet every judicial Act done by him touching the
 Royal jurisdiction shall be good, and shall bind the King de Jure
 when he returns to his Crown. They instance in Pardons, Li-
 censes of alienation in Mortmaine, Grants of Wards, Liveries, &c.
 They urge also That the King de Jure (Ed. 4.) shall have the
 advantage of all Forfeitures made to King Hen. 6. and for a Tres-
 pass committed in H. 6ths. time the Writ shall run contra pacem
 Henrici 6. nuper de Facto & non de Jure, &c. And a Man
 shall be arraigned of Treason committed against Hen. 6. in compas-
 sing his Death. They urge also that any Gifts or Grants made
 by King Henry that were not to the diminution of the Crown shall
 stand good, &c.

The Council on the other side plead, That any common Per-
 son disseized of his Right and returning again shall defeat all the
 mean Acts, therefore a King de Jure returning, invalidates all the
 Acts of the Usurper, &c. But they do not make any direct reply
 to the Arguments of Bagott's Council. After that Bagott's
 (a) 9 E. 4. 4. 2. Council urge at another hearing, (a) That if Ed. 4. in King
 Hen. 6ths. time had granted a Charter of Pardon, it would be void,
 for every one that Grants a Charter of Pardon ought to be King de
 Facto. This is all the plea of Council upon this point; and
 all that I find of the Judges is, First that Judge Billing says,
 (b) 9 E. 4. 2. (b) That to every King by reason of his Office it belongs to do Acts
 of Justice and Grace, Justice in Executing the Laws; Grace in
 granting

granting Pardon to Felons, and such a legitimization as this (of Bagotts) then, that the Judges, (c) After they had conferred with the Judges of the Common Pleas, give Judgment for Bagott. (c) 9 E. 4. 12.

It appears upon the view of this Account of the Proceeding, That what my Lord Coke refers to here, is nothing but the Argument of Bagott's Council: That their Argument is mainly grounded upon the necessity of Government, because there must be some King to uphold and maintain the Laws, and therefore any King's Acts of Government (though he be an Usurper) must be held valid: That they themselves limit the validity of the Grants of a King de Facto, that they be not to the diminution of the Crown: That they do not argue from any Statute of the Realm: That what they say is not directly Answered to or denied by the Council on the other side, nor by any of the Judges; but one of the Judges (Billing) seems to declare his Opinion, upon the Reason of the thing, to the same purpose; and all the Judges (with the advice of the Judges of the Common Pleas) determine the Case in favour of Bagott. This is the utmost that can be made of this Case; and (d) Brooke in his grand Abridgement makes no more of it; Nota (says he) Dicitur & non negatur, quod de proditione facta tempore H. 6. que fuit Usurper del Crown, le party sera araigne pour ceo tempore E. 4. vel hujusmodi, pour compassant le mort de Roy H. 6. quod nota, & sic vide quod trespasse tempore unius Regis potest esse puny tempore alterius Regis comment que l'un fuit Usurper. He Observes that it is said (i. e. by Bagotts Council) and not denied (i. e. by the Council against him or the Judges) That Treason against H. 6. in compassing his Death may be punished by Ed. 4. or any other lawful King (The reference that Brooke has in the Margin is, 4 E. 4. i. e. but there is nothing there in the Year-Books of that nature, and the very words make it appear that he quotes Bagotts Case, and therefore it seems to be a mistake of the Prels for 9 Ed. 4. 1, 2. which Brooke after (e) refers to, in the same page, for the same thing, and I believe my Lord Coke Transcribing these quotations out of Brooke, took them for two distinct quotations, whereas really are one and the same.) (d) Tit. Treason N. 10. (e) N. 28.

And if this be the utmost this Case amounts to, then first it is not Authority sufficient to make it Law, that this was
C pleaded

pleaded by Council and not denied by the Judges or the adverse Party. Secondly, Neither if we grant the *particular points* in the Plea, will it follow, either that *Treason* by our Law lies only against the King in Possession; or that our Allegiance is due to him only. And this will appear by considering the particular points contained in the Plea. As,

First, That the *Judicial Acts and Grants of a King de Facto* shall stand good when the King de Jure, recovers his Crown. This they themselves limit to such Grants as are not to the diminution of the Crown: And Equity and Reason allows, that the Acts of Government done by an Usurper, neither to the prejudice of the Community, nor of the Lawful King's interest, may and ought to be reputed valid after the Lawful King's return; for those Acts not being against his Right and Interest, and being necessary to the very being of the Government under the Usurper, while he cannot be Deposed from his Usurped Power, those Acts say, the King de Jure himself is to be presumed to ratify by his Consent and Allowance, and therefore upon this presumption they become valid and Authoritative, by virtue of his Authority, and not the Usurpers. So all Laws made by the Usurper in Parliament for the publick Good, all Sentences passed in Courts, all Commissions granted by him, all the Actions of the Ministers of State and inferiour Magistrates acting under his Commission, as far as the Reason of Government requires, and they are no prejudice to the Rightful King, ought to stand in full force, even when the King de Jure comes to the Crown. And upon this ground *Bagot's Patent* for Naturalization was looked upon as valid, even against the Letter of the Statute 1 E. 4. c. 1. which Statute by Confirming some Grants of H. 4. 5, 6. might seem to annul all the rest which it did not Confirm (and so the Council against *Bagot* urge it) and yet *Bagot's Patent* was held good, though not Confirmed, by that Statute; which shews that it was held good not by virtue of any Written Law, but because (as *Bagot's Council* Plead) the Reason of Government, and common Equity, requires that such Acts of an Usurper should stand good as tend not to the diminution of the Crown.

But then this is no proof, that all other *Judicial Acts and Grants* whatsoever, though tending directly to the prejudice of the

the *Lawful King*, should be looked upon to Oblige him at his return, or to bind the Consciences of his Subjects, while he is out of Possession; for though the *King de Jure* may be presumed to consent to, and the Subjects are allowed to Obey the Usurper's other Acts of Government, yet this cannot be extended to those Acts that strike at the Authority and Interest of the *King de Jure* himself: Nor can we suppose that *Bagott's* Council Pleading here in *Edw. 4* time, and before his Judges, would say that any of *H. 6. Acts*, done plainly to the disherison of *King Edward*, were to be looked upon as *valid*; nor can we conceive that *King Edward's* Judges would have admitted such a Plea if the Council had made it. This therefore may be enough to shew, that the Plea of *Bagott's* Council may be approved of in this point, and yet it is no good consequence that every Act of an Usurper is Authoritative, or that the Subjects are obliged to pay Allegiance to him.

2. The *Second* point in the Plea of *Bagott's* Council, is, That the *King de Jure* at his return to the Crown, shall have the advantage of all Forfeitures, for any Trespases committed against a *King de Facto*, and that he may punish Treason committed against a *King de Facto*, by any one that compassed the *King de Facto's* Death. This also is very true if we restrain it to such Acts against the *King de Facto*, as the Right and Interest of the *King de Jure* does not require or justify the doing it. For,

First, There are many Offences which are only against the Order of the Government, and the Peace of the Society, or the Rights of some private Persons, and not against the *King de Facto's* Person or Crown; as Theft, Murder, Perjury; and some kinds of Treason, as Clipping and Coyning, killing a Judge upon the Bench, Counterfeiting the *King's* Seal, adhering to a Foreign Enemy, (that makes War not upon the Usurper as such, in the *Lawful King's* behalf, but upon the Nation, and so implicitly upon the *Lawful King*, whose Interest would be ruined if a Foreigner should Conquer the Nation) betraying any Fort or Castle, or the like. Now these Offences are justly punishable by the *King de Jure* himself when he comes to the Crown, or by the inferior Magistrates, (acting under the Usurper's Commission) while the *King de Jure* is out of Possession: they are justly punishable by himself, because they terminate upon his Authority, and upon the interest which he has in the

(f) Dr. Burnet's Life of Fudge Hale, p 36, &c.

regular and orderly Proceeding of the Government, though he is excluded from the Administration of it: They are punishable also by the inferiour Magistrates, by vertue of his presumed Will Authorizing them to act for his, and the Nation's Interest, though under an Usurper. And upon this ground we find that Fudge (f) Hale did not scruple to Try Felons under Oliver Cromwel, though he scrupled to Try any Offenders against the State.

Secondly, There may be some Acts against the very Person and Crown of the Usurper, which may be done out of a private seditious Principle, or for the interest, not of the King de Jure, but some other Person, merely to disturb the Government, or to set up a Second Usurper in the place of the First. Now these Acts may be justly punished as Treason, either by the Inferiour Magistrates under the Usurper, or by the King de Jure, when he comes to the Crown. For,

First, These Acts strike indirectly at the King de Jure's Person and Crown through the Usurper; and therefore either himself may punish them as done against himself, or the inferior Magistrates may punish them by vertue of his presumed Will and Consent.

Secondly, The Necessity of Government requires that the Laws and Courts of Judicature stand by the King in Possession, though an Usurper, against any other Person pretending to the Crown, but the Lawful King: And therefore an attempt to kill or depose him, to make way for another Usurpation, may be justly punished as Treason even by the King de Jure himself, and his Consent may be presumed to authorize the inferiour Magistrates to do it, during his Exile. Thus therefore it might have been just for Edw. IV. to attain of Treason any Person that had compassed the Death of King Hen. VI. or loved War against him, for any other end and purpose than to promote King Edward's Interest, and to bring him to the Crown: And so this second point of the plea of Bagot's Council may be allowed of: But then it is no consequence, that any Acts done against the Usurper in behalf of the King de Jure, to bring him to the Crown, may be justly punished either by the Usurper, or by the inferiour Magistrates under him, or much less by the King de Jure himself when he comes to the Crown, Neither is it conceivable that Bagot's Council meant this

by

by their plea; that those who *Alled* against Hen. VI. to bring Ed. IV. to the Crown might be *Attainted* by Ed. IV. for *Traitors* and *Rebels*, for fighting against Hen. VI. the King in Possession in King Edward's behalf; this would have been a *bald* Plea in King Ed. IV's time, and before his Judges; and yet this must be their Plea to prove from it, that *Treason* can be committed against only the King in Possession.

It may be Objected that the *Attaindors* of Persons by a King *deFacto* for fighting against him in behalf of the King *de Jure*, have been looked upon as *valid* by the Kings *de Jure* when they came to the Crown. For instance *Rich. 3.* had *Attainted* those that came against him under Hen. 7. and his Parliament declare *Richard* to be an *Usurper*, yet they thought not fit to let any of them whom he had *Attainted* sit in Parliament (g) till their *Attaindors* were first taken off: which is a confession that they looked upon their *attainders* as *valid* till they were repealed. To this I Answer,

(g) *Bac. Vn.*
Hen. 7. p.
1004.

First, *Rich. 3.* though he was an *Usurper*, being not the First of the Blood of the House of York, yet his Title to the Crown was good against Hen. 7. he being of the House of Lancaster, and not the First of the House neither, his own Mother being alive.

2. But Secondly, Granting that Hen. 7. and his Parliament looked upon Hen. 7. as King *de Jure*, and *Rich. 3.* as an *Usurper* of the Crown, as they stile him, their thinking it proper to take off the *attaindors* of those whom *Rich. 3.* had *attainted*, is no certain proof that they looked upon their *attainders* as *valid*, for though they had looked upon them as *null* in themselves, yet they might think fit to Repeal them for the Satisfaction of the Nation, and the security of the Persons *Attainted*, who might otherwise have been liable to be Executed upon these *Attaindors* if there should have been a *mn*: So no question Ed. 4. looked upon the Proceedings of the Parliament 49 H. 6. (Summoned by Hen. 6. when Ed. 4. in the ninth year of his Reign was fled out of his Realm) wherein himself and all his adherents were *Attainted*, as *null* and *invalid*; else he would have Repealed those Proceedings in his next Parliament; yet eight years after he thought fit to Repeal them, (b) for the safety of his Noble Person, his Noble Mur, and the in- (b) Stat. 17.
deposable Succession of the same, and for the safety of all the Lords, Ed. 4. c. 7.
Noblemen,

Noblemen, and other his Servants and Subjects, i. e. to secure them from any danger, from the Attainders in that Parliament, & there ever should be a return of the Lancastrian Family.

Thirdly, Granting that King H. 7. and his Parliament did look upon these Attainders as *valid*, what is the consequence? viz. that they allowed it was *Treason*, to fight Rich. 3. the King in Possession, though an Usurper, in behalf of Hen. 7. whom they conceived to be the King de Jure. Then sure, if they thought it was *Treason* to fight against Rich. 3. the King in Possession, they could not look upon it as *Treason* to fight for him;

(i) *Bac. Vit.* And yet the very same Parliament (i) *Attains* both Rich. 3. himself, and all those that fought under him in Bosworth Field. So that we see what good Law we are like to have, if we believe every thing which may be given us for Law out of the Statute and Year-Books; for then we may, upon the Authority of the very same Parliament, make it *Treason* on both sides, to fight for Hen. 7. against Rich. 3. and to fight for Rich. 3. against Hen. 7. The former to fight against Rich. 3. that Parliament is conceived to allow to be *Treason*, because they looked upon the Attainders of those whom Rich. 3. had Attainted for being in Arms against him, as *valid*, till they were Repealed: and the latter to fight for Rich. 3. they declared to be *Treason*, because they Attainted those that were in Arms under him against Hen. 7.

Before I pass on to the last point of Bagott's Plea, I may, from this Second Part of it, give an Answer to one of the most specious Arguments that is brought, to prove that our Allegiance is due to the King de Facto, though not de Jure; The

(k) *Considera.* Argument is drawn from the usual Form of the (k) Indictment for the taking of Treason, which runs for committing that Crime the Oath of *Contra debium Fidei & Ligeantie sue quod prefato Dominus Regi naturaliter & de Jure impendere debuit*; or, *Contra Dominum Regem Supremum & naturalem Dominum suum*; or, *Contra naturalem Ligeantiam Domino Regi debitam*. Now if in the Indictment for Treason against a King de Facto and not de Jure, the Treason be said to be committed Against our Supream and Natural Leige-Lord, against our Natural Allegiance due to him, against that Duty of Faith and Allegiance which we naturally and of right ought to yield to him; then surely our Allegiance is due to a King in Possession, though not de Jure. To this I Answer,

First,

First, It is no wonder if in the *Reign of the King de Facto* himself, the Indictments for Treasons committed against him run thus in the *usual form*; for though he be an Usurper, yet being in Possession he will no question assume to himself the stile and Authority of a *Lawful King*, and while the Laws and Courts of Judicature are in his Power they must call him their *Supreme and Natural Liege Lord*, and implead any one that Acts against him for violating the *Allegiance*, which *naturally* and *of right* he ought to pay him. But the question is not, whether an Indictment for Treason against the *King de Facto* will run thus in his own *Reign*; but whether it will run in the same form in the *Reign of the King de Jure*, after he has recovered his Crown.

Secondly, Though it should run so in the Subsequent *Reign of the King de Jure*, yet this would be no certain proof that the Law looks upon a *King in Possession*, though an Usurper; as our *Natural Liege Lord*, and our *Allegiance as due to him naturally and of right*. For the Lawyers use to keep close to their usual forms, in *Indictments* especially, and retain in them many expressions, as *improper* to be used in some particular Cases, as these expressions are in the Case of a *King de Facto*, and not *de Jure*. But,

Thirdly, It does not appear that an Indictment for Treason committed against Hen. 6. brought against the Person that committed it in *Ed. 4.* time, would have run in the *same form*, as if he had been *King de Jure*. It does not appear, because if there were any such *Indictment* to be found, it would have been produced by those that urge this Argument; but all that they alledge to prove Treason against a *King de Facto* is *Bagot's Case*, and that rather proves the contrary, viz. that an Indictment under *Ed. 4.* for Treason committed against Hen. 6. would not run in the usual form, as in the Case of a *King de Jure*. An Indictment for a *Trespass* usually runs *Contra pacem Domini Regis, Coronam & dignitatem suam*; and this form is also a part of an Indictment for Treason, which is both *Contra pacem & contra dignitatem*. Now is said expressly by *Bagon's Council*, that an Indictment for a *Trespass* against Hen. 6. brought in *Ed. 4.* time, would run thus, (1) *Contra pacem Hen. 6. super de Facto & non de Jure*, &c. (1) 9 E. 4. 11. and if so, then by parity of Reason the same expression *Sup. (a) pp.* would.

would be used in Indictments for Treason; and if that expression be put in; I think it will require that those of *Natural Liege-Lord*, and *Allegiance due naturally and of Right*, be left out; otherwise the Indictments must run thus, *Contra Dominum Regem Hen. 6. nuper de Facto & non de Jure, Supremum & naturalem Dominum suum*; or *contra debuum fidei & Liegeantiae suae quod Domino Regi Hen. 6. nuper de Facto & non de Jure, naturaliter & de Jure impendere debuit*: i. e. *against his Supreme and Natural Liege-Lord Hen. 6. late King in deed, but not in Right*; or, *against that Duty of Faith and Allegiance, which he naturally and of Right ought to pay to Hen. 6. late King in Deed, and not of Right*. These expressions I think do not very well *suit* together; at least the addition of *King de Facto and not de Jure*, does seem so to qualify the rest, that no *act* can be made Treason in any such Indictment, that is done against the *King de Facto*, in behalf of the *King de Jure*, to bring him to the Crown; for then the Indictment must run thus, *A. B. Against his natural Allegiance due to Hen. 6. late King de Facto, and not de Jure, was aiding and assisting to our Sovereign Lord that now is, (Edw. 4.) then King de Jure, but not de Facto, for the recovery of his Right*. This therefore may be a sufficient Answer to the Objection from the form of the Indictments for Treason; to shew that they are no proof that our Allegiance is due to the *King de Facto*, though he be not *King de Jure*.

But I pass on to the last point in the Plea of Bagot's Council, *That a Pardon granted by a King de Jure, out of Possession, is void*, and this may very well be admitted: For a *King de Jure out of Possession*, while his Subjects are not able to restore him, cannot send over a Pardon of Felony, Treason, or the like, to any purpose, but only to have his own Authority exposed, and his Loyal Subjects lose their Lives, or Estates, by endeavouring to maintain it: For to have this Pardon take effect, it must be pleaded in Court, and there it cannot have its effect to save any Person whom the Usurper will have executed; besides that the Person pleading it would be in danger to be proceeded against as a Traitor, for abetting the *King de Jure's* Authority against the Usurpers.

This

This may clear the meaning of that part of the Plea of Bagot's Council, that a Pardon granted by a King *de Jure* out of Possession is void, i. e. it cannot have its Effect, and be pleaded and received in Court, while the King *de Jure* is out of Possession: But then, it does not follow, because he cannot execute his Royal Authority in the *pardonning* or *punishing* Treason while he is out of Possession, that therefore there can be no Treason Committed against him while he is out of Possession, or that it is Treason to *act* for him against the Usurper; for though the King *de Jure* have not the Exercise of the Government, yet he has a Right to it, and the Subjects may thereupon be obliged in Conscience to *bring him* into the Possession of his Right when they are able, and it may be Treason in them to *fight* against his Right for the Usurper, though King in Possession.

To conclude therefore, First, It does not appear upon the view of the particular Points in the Plea of Bagot's Council, that any thing can be alleged from that Plea to make out the Lord Chief Justice Coke's Gloss upon the Stat. 25 E. 3. C. 2. viz. That the Treasons in that Statute can be Committed only against the King in Possession, whether King *de Jure* or no; or to prove, That the Allegiance of the Subjects is due to the King in Possession only, whether King *de Jure* or no.

2ly. Though Bagot's Council had made such a Plea, and the Court had allowed of it; yet this is not enough to make it good Law; especially when the very Statute of Edw. 3. and other Statutes, and the Practice of the Realm (even in Edw. 4th's. and after in Hen. 7th's. and Queen Mary's time) prove the contrary; as was shewed above.

3dly. Though there were Statutes and Customs for it, viz. That a Man might be Guilty of Treason, and punished as a Traitor, for acting in behalf of his lawful and rightful King against an Usurper in Possession; and not Guilty for acting in an Usurper's Cause against his lawful and rightful King out of Possession; yet such a Statute and Custom would be null and invalid, as contrary to the Fundamental Constitution of the Realm, and to the Law of God and Nature, as will appear under the next head, the Stat. 11 Hen. 7. c. 1. which I come now to consider.

D

This

This Statute is my Lord Coke's main proof of his assertion; *That Treason lies only against the King in Possession*, and may be urged as sufficient by it self to make it Law *since that time*, though it had not been so either by Statute, or Common Law, *before*; and it is also made a *distinct* Argument, to prove directly, *That Allegiance is due to the King in Possession only*.

The main of the Statute is in these Words, *The King our Sovereign Lord calling to his remembrance the Duty of Allegiance of his Subjects of this his Realm, and that they, by reason of the same, are bound to serve their Prince and Sovereign Lord, for the time being, in his Wars for the Defence of him and the Land against every Rebellion, Power and Might reared against him-----and that for the same Service, what Fortune ever fall by chance in the same Battle against the Mind and Will of the Prince-----it is not reasonable, but against all Laws, Reason, and Good Conscience, that the said Subjects going with their Sovereign Lord in Wars-----any thing should lose or forfeit for doing their true Duty and Service of Allegiance. It be therefore ordained, enacted, and established, by the King our Sovereign Lord,----that from henceforth no manner of Person or Persons whatsoever be or they be, that attend upon the King and Sovereign Lord of this Land, for the time being in his Person, and do him true and faithful Service of Allegiance in the same, or be in other Places by his Commandment in the Wars within this Land, or without; that for the said Deed and true Duty of Allegiance, he or they be in no wise Convict or Attainted of High Treason, ne of other Offences for that Cause, by Act of Parliament, or otherwise by any Process of Law, whereby he or any of them shall lose or forfeit Life, Lands, &c. but to be for that Deed and Service utterly discharged of any vexation, trouble, or loss,-----provided always, that no Person or Persons shall take any benefit or advantage by this Act, which shall hereafter decline from his or their said Allegiance.*

The Statute consists of two Parts, the Preamble, and the Body, and upon the view of it we may observe.

1st. That it is not enacted in the Body of the Statute, that the Subjects shall be obliged to pay Allegiance to the King for the time being, so that, if what is enacted in the Body of

of a Statute only, be Law, then the *Allegiance* of the Subjects is not due, by Virtue of this Statute, to the King for the time being. The direct intent of the Body of it is to indemnify those that fight under the King in Possession, and their being indemnified for fighting under him, is no Argument that it is lawful for them to do it, much less that it is their Duty; for they may be Guilty in *foro interno*, of Treason and Rebellion, for fighting under the King in Possession against the King de Jure, and yet it may not be unjust or improper to indemnify them in *foro externo*, by such a Statute. 1st. Because many that fight under the King in Possession, do it in the Simplicity of their Hearts. 2^{ly}. Because this would prevent any revengeful effusion of Blood by the King de Jure at his coming to the Crown. All therefore that the Body of the Statute proves, is, that (though by the Stat. 25 Edw. 3. it were Treason to fight for an Usurper against the King de Jure out of Possession, yet) he that fights for an Usurper against the King de Jure out of Possession is indemnified by this Statute; and so he is not punishable as a Traytor, though he has the Guilt of Treason upon his Conscience; and if he may still be Guilty of Treason, then still his Allegiance may be due to the King de Jure out of Possession, so as to oblige him not to act any thing against him in behalf of the Usurper.

2^{ly}. We may observe upon the view of the Statute, that the Preamble of it does not directly and positively declare, that the Allegiance of the Subjects is due to the King for the time being, but only obliquely supposes and insinuates it. The King is said to call to his remembrance his Subjects Duty of Allegiance, and that they, by Virtue of it, are bound to fight for the King for the time being, &c. This is not to declare it to be so (by Virtue of the Authority of King and Parliament to interpret the former Laws about the Subjects Allegiance,) but to suppose it as a thing certainly fixed and determined by the Law already; and so also it is obliquely insinuated in the Body of the Act, that their fighting under a King de Facto, is doing their true Duty and Service of Allegiance. And if this be only supposed, and that Supposition have no ground neither in the Fundamental Constitution of the Realm, nor in any former Statute or Custom, but these all, do all of them, clearly demonstrate

the contrary, as was shewed above; then I think the *Preamble* of this Statute cannot be urged upon the *Consciences* of the Subjects, as a *Law* obliging them to *transfer their Allegiance* from their *lawful King* to any *Usurper* getting in- to the Possession of the Throne, and to *Fight* under the *Usurper* against their *lawful King*, if he attempt to recover his Crown.

3ly. We may observe upon the view of this Statute that one thing laid down in the *Preamble*, as the ground for the indemnifying part of the Act, is expressly false, viz. That it is not reasonable, but against all *Laws*, *Reason*, and *Good Conscience*, that the Subjects going with their *Sovereign Lord* in Wars---(even though against the *King de Jure* as it must be understood) any thing should lose or forfeit for doing this their true *Duty* and *Service of Allegiance*. Now this if it be meant (as it must be) concerning those that *Fight* for an *Usurper* against their *lawful King*, that it is against the *Laws*, *Reason*, and *good Conscience* to punish them in the least for so doing, is very high indeed. For,

1st. Though our *Law* might think fit to Indemnify them, yet it is not so clear that all other *Laws*, *Divine* and *Humane*, even the *Laws of Reason* and *Good Conscience* do make it unjust to punish them, who (not in the *Simplicity* of their Hearts, but upon a *Traiterous* and *Rebellious Principle*) fight in Defence of an *Usurper* in the Throne against their *lawful Prince*, excluded or deposed from his just *Rights*. It would not, I suppose, have been unlawful for *David* to have punished those which came in Arms against him, under *Absalom*, to keep him from recovering his Throne. Nor, I believe, would his *Heart* have smote him if he had executed any of them for *Traitors*, as it did when he cut off *Saul's Skirt*. In short, to say this is contrary to *Reason* and *Good Conscience* is to set up a new *Standard* of *Reason* and *Religion*; and to make it contrary to all *Laws*, is to accuse all *Nations* but our own, of *Injustice* and *Cruelty*.

Secondly, Nay, it is to accuse our own *Nation* too, and several of our *Kings* and *Parliaments*, and among the rest *King Henry the 7th.* and his *First Parliament*, who did not think it against all *Laws*, *Reason*, and *Good Conscience* to attain (a) those that fought against *Hen. the 7th.* under *Ric. the*

(a) sup. p.

3d the King in Possession (and *de Jure* too against *Hen. 7th*) in *Bosworth-Field*. So that to me the *wording* of this Act appears to be a Copy of *King Hen. 7th's* countenance, who could call to his remembrance that it is against all *Laws, Reason and good Conscience*, that the Subjects should be attainted for fighting under the *King in Possession*, and could forget to repeal his own Statute, whereby those that adhered to *Ric. the 3d.* stood attainted for doing this their true Duty and Service of *Allegiance*. And with what Face could he, or his Parliament, say it was against all *Laws*, when it was not against his own? When both himself and other Kings before him, with their Parliaments had attainted both the adherents of the *Kings in Possession*, and the very *Kings in Possession* themselves?

But granting this were the *Body* of the Statute, and a direct Law enacting that the Subjects shall pay their *Allegiance* to an *Usurper in Possession*, and fight for him against their lawful King, and be Indemnified for it: Then it will remain to be considered, whether the Statute can be looked upon as *valid and obligatory*. And I conceive it ought not to be looked upon as *valid and obligatory*, upon these Reasons.

First, Because it was made by an *Usurper*, and a Parliament no farther *Legal*, than as it had its Authority from him, and it was made for this end and design to secure the *Usurper* himself in the *Possession* of the Throne, and to confirm his Soldiers to his Party, by Indemnifying them, if they stood by him, and depriving them (by the Proviso at the end of the Statute) of the benefit of the Statute, if they should desert him. That *Henry the 7th.* was an *Usurper* upon the Rights of the House of *York*, I need not prove: And that this Statute was made to secure him in his Usurpation, against any one pretending, or having Right and Title of that House appears by the time when the Statute was made, which was when *Perkin (a) Warbeck* was up in Arms against him, declaring himself to be *Ric. the 2d.* Son of *Edw. H. 7. p. 1077.* the *4th.* and consequently the Heir of the House of *York*; and *seq.* the danger *King Henry* was in upon this (by the sense the generality of the Nation had of the Right to the Crown being in the House of *York*) appears by the Words of Sir *(b) Bacon*. *p. William Stanley (b)* (the very Person who set the Crown on *1071.*

King

King Henry's Head after the Battle of Bosworth) that if he certainly knew that the Young Man Perkin were the Son of King Edward the 4th, he would never fight nor bear Arms against him, (so little did he understand at that time, that which King Henry could so well call to his remembrance, that the Subjects ought by virtue of their Allegiance to fight for the King for the time being, against the lawful Heir of the Crown.) This therefore was the Authority whereby, and the end for which (c) this Statute was made: And if so, then it ought to be looked upon as null and invalid: For though a Law made by an Usurper for the good of the community, and not prejudicial to the lawful Right of the Crown, may in equity be looked upon as valid; yet no other Law, made to the disherison (d) of a lawful King, ought to be held obligatory upon the Consciences of the Subjects, to make it their Duty to do that, which otherwise would be an Act of the Highest Treason, viz. To fight for an Usurper against their rightful and lawful King.

(c) Dr. B's.
Reply to Mr.
Varillas, p.
71. Hen. 7.
Weakened the
Rights of the
Crown of
England,
more than
any that ever
reigned in it:
He knew he
could not
Found his
Title on his

It may be objected that the subsequent lawful Kings have consented to this Statute. I answer,

First, They have not consented to it any farther than by their not expressly repealing it, or declaring it to be null in

descent from the House of Lancaster, for then he could have been no more than Prince of Wales, since his Mother, by whom he had that pretension, outlived him a Year; and he would not hold the Crown by his Queen's Title, for then the Right had been in her, and had passed from her to her Children upon her Death-----and therefore he who would not hold the Crown upon such a doubtful Tenure, made that dangerous Law. That whosoever is in Possession of the Crown, is to be acknowledged as the Legal King.

(d) See the Answer of Richard Duke of York to the Objection made against his claim from the Act of Entail made by Henry the 4th. upon his Heirs Male, The said Act taketh no place, neither is of any Force or Effect against him that is right Inheritor of the said Crowns, as it accordeth with God's Law---and all natural Laws; how it be that all other Acts and Ordinances made in the said Parliament sithen, been good and sufficient against all other Persons. Rot. Parl. 39. H. 6. n. 17. Quoted by D. Brady in Hist. Suc. p. 27.

Some of their Parliaments; and this does not amount to a *consent*. For their cause of their not repealing it, may be, *First*, Because the subsequent Kings since Henry the 7th. have not had any occasion to see the evil consequences of it, by any general compliance of the Nation, with an *Usurper* against their *lawful King*, under colour of being obliged thereto by this Statute. Secondly, The Statute has been generally understood to do no more than *Indemnise* those that fight under the *King de Facto*; and this our Kings might not look upon as *unjust*, or *inexpedient*; and therefore might see no necessity of repealing the Statute. But it cannot be conceived, but that any *lawful King* who had been excluded or deposed by an *Usurper*, and had seen that the Nation had looked upon themselves as *obliged* by this Act to *stand by the Usurper against him*, would, if ever he had come to the Crown, have made it his business to *declare it null and invalid*.

Secondly, This Statute has, in *effect*, been declared to be *null and invalid*, by the subsequent *lawful Kings and Parliaments*. I say, it has been in effect declared null and invalid, though *not expressly repealed*, by the subsequent *Kings and Parliaments*; and that in two ways,

First, By their *proceeding expressly contrary to the Letter* of it.

Secondly, Their laying a *contrary Obligation* on the *Consciences* of the Subjects.

First, By their *proceeding expressly contrary to the Letter* of this Statute. The Statute enacts, "That those that serve the King for the time being in his Wars, shall be in no wise convicted or attaind of High Treason by Act of Parliament, or otherwise by any process of Law: And that if any Act or Acts, or other process of Law, hereafter thereupon for the same happen to be made, contrary to this Ordinance, that then that Act, or Acts, or other Process of the Law, whatsoever they shall be, stand and be utterly void. Now if notwithstanding this, any Persons have, for acting that for which this Statute *Indemnifies* them, been convicted and attaind of High Treason by Process of Law, and executed thereupon; and this Conviction and Attainder, and their execution thereupon, has been declared

By

by Act of Parliament to be Lawful and Just, and according to the Laws of the Realm: It follows that the Authority whereby they were convicted; attainted and executed, and their attainders confirmed in Parliament, must be looked upon to declare this Statute *null and invalid*. And yet we find a plain instance of this, in the case of the Duke of Northumberland, &c. in Q. Mary's time. The Duke of Northumberland had been sent down with an Army, by Order of Council, and by a Warrant under the Great Seal, in behalf of Queen Jane, the then alone Proclaimed Queen, against Queen Mary; for this Treason he is afterwards tryed by his Peers, attainted, and executed, and his attainder confirmed in the next

(a) 1 Mar.
Sess. 2. c. 16.

(a) Parliament, and therein he and other Persons are declared to have been lawfully, justly, and according to the Laws of the Realm convicted, or attainted, and to have suffered the pains of Death according to their *demerits*. And yet this could not be looked upon as according to Law, if the Stat. 11 Hen. 7. were looked upon as *valid*: Which will more clearly appear if we consider that the very Plea of the Duke of Northumberland seems to be grounded on this Statute. His Plea consisted in two points, which he

(b) Dr. Burnet's Hist. Reform. p. 2. p. 248. Id. of Treason? To this the Court, with the advice of the Judges, Reflection on the 3d. and 4th. Tomes of

proposed to the Court, one whereof was, (b) Whether a Man acting by the Authority of the Great Seal, and the Order of the Privy Council, could become thereby guilty of Treason? To this the Court, with the advice of the Judges, made answer, That the Great Seal of one that was not lawful Queen could give no Authority nor Indemnity to those that acted on such a Warrant. Now if this Plea were legally over-ruled upon this Ground, and he thereupon as p. 126. attainted and executed, and his attainder confirmed in Parliament, as Just and Legal; it plainly follows that the Judges and his Peers which over-ruled his Plea, and the Law that Parliament which confirmed their proceedings, do in effect might have declare the Statute 11 H. 7. *null and invalid*, and must be some colour conceived, either not to have thought of it, or if they did in it, yet it to have looked upon it either as temporary only for King was far from Henry's Reign, or as of no Force or Authority, because tending to the disherison of the lawful Queen.

ing any; for a Council, or a Great Seal flowing from an Usurper is nothing; so this Authority could not justify him.

But

But it may be said, *Queen Jane* was not in full Possession of the Crown, being only *Proclaimed Queen*, and not continuing in the Throne more then ten days. I answer,

First, She was *Proclaimed Queen* by the *Lords of the Council* and by the *City*, and in most great Places of the Kingdom, and had taken upon her the Exercise of the Government, and had her *Council* and *Great Seal*, &c. And if this be not enough to make her *Queen in Possession*, it is to be shewed what more was necessary to make her so, and upon what Grounds; especially, when it appears, that *Queen Mary* her self was no more then *Proclaimed*, when the *Duke of Northumberland*, &c. was tried, attainted and executed by her Authority: Neither was she so much as *Proclaimed*, when he committed this Treason against her, for immediately after she was *Proclaimed* by the *Lords of the Council*, he, before he received their Orders, submitted and (a) *Proclaimed* her himself at Cambridge.

Secondly, If this be sufficient to take off the Argument from the Proceedings against the *Duke*, then this rather should be the Ground whereupon his Plea was over-ruled, but it is plain that both his Plea, and the Answer the Court made to it by the Advice of the Judges, suppose *Queen Jane* to have been *Queen in Possession*, and his Plea was not over-ruled because she was not in full Possession, but because she was not lawful *Queen*, and therefore her *Great Seal* could give no Authority, nor Indemnity to those that acted by such a Warrant. And if this Ground be good and legal (as we see it was conceived to be by the Judges, and allowed of by the Peers and the Parliament) it plainly nulls King Henry's Statute and justifies the Attainting for Treason any Person that fights against a *King de jure* out of Possession, though by a Warrant under the Broad Seal, and an Order from the Council of an Usurper in full Possession.

Secondly, The Statute 11 H. 7. has been in effect declared null by the succeeding lawful Kings and Parliaments, in as much as they have laid the contrary obligation upon the Consciences of the Subjects. For if the succeeding Kings and Parliaments have expressly made it High Treason to stand by any Usurper against the *King de jure* or his Heirs and lawful Successors, whom the Usurper has deposed or excluded from the Crown; if they have obliged the Subjects to swear to maintain the *King de jure* and his lawful Heirs and Successors against any Usurper who shall

(a) Dr. Burnet's hist. Reform. P. 2. p. 239.

depose or exclude them : Then herein they have obliged the Subjects to *act contrary* to the Statute of *Hen. the 7th*, which requires them to *maintain and defend the Usurper against the lawful King*, his Heirs and Successors. Now that the Succeeding Kings and Parliaments since *Henry the 7th*, have done this, will appear from clear and undeniable instances.

First, They have expressly made it High Treason to *stand by an Usurper against the King*, or his Heirs and lawful Successors, whom the Usurper has deposed or excluded.

(a) Stat. 25.

H. 8. c. 12.

28. H. 8. c. 7.

35. H. 8. c. 1.

This is done by *Henry the 8th* in the several Acts (a) for the security of his Succession made in the 25, 28, and 35th Years of his Reign in each whereof after the Settlement of the Succession, it is made Treason for any Persons to do any thing whereby either the King himself, or his Heirs according to that Settlement, may be disturbed or interrupted in the enjoyment or inheritance of the Crown ; and Treason in all that should abet, aid or maintain them. And in the Act 28 H. 8. it is enacted, that if any of the Kings Children, or any to whom he should dispose the Crown by his Will should Usurpe upon any who were to inherit the Crown before them, they and all their abettors and maintainers should be adjudged High Traitors. So also 1 Edw. the 6. it is made Treason for any to whom the Crown was limited by the Act 35 H. 8. to Usurpe upon one another, and Treason also in their Abettors, Aiders and Maintainers. I do not pretend to justify the Proceedings of *Hen. the 8th*, and his Parliaments touching the Succession ; only this I may rightly infer from them, that they without any regard to the Statute of *Hen. the 7th*, made it Treason to maintain any one in Possession of the Crown, but those Persons who should succeed according to the limitations made by them ; and therefore did not leave the Subjects free to yield their Allegiance, according to *King Hen. the 7th's* Statute, to every Person whatsoever that should get into Possession of the Crown.

Secondly, They have obliged the Subjects to swear to maintain and defend the King and his lawful Heirs and Successors against any Usurper that should depose or exclude them. So each Act for the Settlement of the Succession in *King Henry the 8th's* time, had an Oath annexed to be taken by the Subjects for the observance and defence and maintenance of it. I shall set down the first (a) Oath from which

(a) Stat. 26. H.

8. c. 2.

which the others vary but little, only in that of the 35th H. 8. the Pope's Supremacy is abjured) ye shall swear to bear faith, truth and obedience alonely to the King's Majesty, and to his Heirs of his Body of Queen Ann begotten, or to be begotten, and further to the Heirs of our Sovereign Lord according to the limitation in the Statute made for surety of his Succession—and not to any other within this Realm, nor Foreign Authority or Potentate—and that to your cunning wit, and to the uttermost of your Power, without guile, fraud or other undue means, ye shall observe, keep, maintain and defend the said Act of Succession, and all the whole effects and contents thereof— And this ye shall do against all manner of Persons of what Estate, dignity, degree or condition whatsoever they be. And in no wise do, or attempt, nor to your Power suffer to be done or attempted directly or indirectly any thing to the let, hindrance, damage or derogation thereof, by any manner of means, or for any manner of pretence. So help you God, &c.

This Oath and others of the like form were annexed to the Acts about the Succession in King Henry the 8th's time, to be taken by the Subjects; and it is plain they laid an obligation upon their Consciences directly, contrary to the Stat. II. H. 7. They are obliged to pay their Allegiance to no other Person Native or Foreigner, but the King and his Heirs according to those Acts: And therefore cannot be at liberty to pay their Allegiance to every Person that gets into Possession of the Crown. They are obliged with their utmost Wit and Power to maintain those Acts of Succession against all manner of Persons whatsoever, and therefore cannot fight against the King *de jure* H. 8. or his Heirs according to those Acts, in defence of any other Person, though he may become the King for the time being. They are to their Power not to suffer any thing to be done in derogation of those Acts, and therefore not to suffer any Person in the Throne, that gets into it contrary to them: So that unless they can reconcile contradictions, their obligation to these Acts is inconsistent with any obligation to King Henry the 7th's Statute.

And the same Argument, to come nearer to our own time, may be drawn from the Oaths of Supremacy and Allegiance enacted in Parliament by Queen (a) Elizabeth and K. James, 1 Eliz. c. 1. whereby the Subjects are also sworn, to bear Faith and true Allegiance to the King his Heirs and lawful Successors, and him and them to defend to the utmost of their Power a-
(a) Stat. 1 Eliz. c. 1. 3 Jac. c. 4.

gainst all Conspiracies and Attempts whatsoever: which is inconsistent with their transferring their Allegiance to an Usurper and maintaining him in Possession of the Crown against the lawful King deposed, or his Heir excluded by him.

But it may be said that our sworn Allegiance is such only as is due by the Law of the Land, if therefore the Law transfers our Allegiance from the lawful King and his Heirs to a King in Possession, then our Allegiance must be understood to be sworn to them with that reserve. I answer,

1st. The Oaths imposed by the Acts of Succession in H. the 8th's time do plainly contradict the Stat. 11 H. 7. and the Oaths of Supremacy and Allegiance made by Queen Elizabeth and King James must be understood to do so too, being partly couched in the same words, and the Oath of Supremacy drawn from the former Oath of Supremacy enacted by the Stat. 35 H. 8. and both equally intended for the Security of the lawful King and the Succession: and therefore,

2^{ly}. When a subsequent Statute imposes an Oath contradictory to the Letter of a former Statute, it must be interpreted virtually to repeal that former Statute. So for instance the Stat. 28 H. 8. c. 7. obliges the Subjects to swear to maintain the Settlement of the Succession made by that Statute, even against any of the King's Children that shall Usurp the Crown before their time; how can this be understood with a reserve, that if any of them should Usurp and get into the Throne, the Subjects then should be obliged to abett and maintain them:

3. But 3^{ly}. the Question is not so much, whether the succeeding Kings and Parliaments have repealed the Statute 11 H. 7. as whether they have not looked upon it always as null and of no Authority: and I think their passing Acts of Attainder, contrary to the Letter of it, and making it Treason to stand by an Usurper, and obliging the Subjects to swear to defend the lawful King and the Succession against all Persons whatsoever, is a sufficient proof that our Kings and Parliaments ever since the 25th. of Hen. 8. have looked upon the Statute 11 H. 7. as of no Authority, and in effect declared it to be null and invalid.

II. But granting that this Statute was made by a Legal Authority, and has stood ever since unrepealed, I proceed to shew in the second place that it is to be looked upon as in itself null and invalid in respect of the matter of it. A Statute though made at first by a lawful Authority, and not

not ~~affected~~ *repealed* by any subsequent Parliament, may yet be looked upon as null and invalid, if the matter of it be impossible or unjust, if it be repugnant to Common Sense or contrary to the Law of God and Nature. So the Lord Chief Justice Coke observes (*Instit. P. 2. p. 587.*) in his Commentary upon the Stat. de assertatis Religiosis, one branch of which Statute he says was declared by the Court of Common-Pleas to be void, because impossible and inconvenient to be observed, and quotes Bracton for the Properties of a Law, *Lex est sanctio justa, jubens honesta, & prohibens contraria*; it may be therefore a sufficient proof of the nullity of this Statute, that it is not, as Bracton requires, *Sanctio justa, jubens honesta & prohibens contraria*; but rather, as I shall proceed to shew, a Statute establishing Iniquity by a Law. For it either de vests the lawful King of his Right to the Crown, and gives it to the Usurper; or it still reserves his right to him, but yet notwithstanding, orders the Subjects to obey and stand by the King in Possession on tho an Usurper. The first of these cannot fairly be pretended, for if it gives away the Right of the lawful King; then,

1st. He ceases to be King *de jure*, the lawful and rightful King of this Realm, and this (besides that it is contrary to what our Lawyers allow) takes away the ground of this whole dispute, the distinction between King *de jure* and the King *de facto*.

2^{ly}. He cannot then justly make War upon the Nation for the recovery of his Crown: but must sit down quietly by his loss, and is answerable for all the Blood that is shed in the War he makes, if he attempt to restore himself by a Foreign Force: for if his Right be transferred he cannot then justly demand the Subjects Allegiance, and what he cannot justly demand, that he has no right to use force for the recovery of; and therefore must be content to stay till the Usurper dye, and then perhaps his Right may revive again unless the Usurper be so wise as to provide himself a Successor, and leave him in Possession.

3^{ly}. It will follow (if this Statute give away the Right of the lawful King to the Usurper) that one King with his Parliament may make a Statute to alienate and transfer the Right to the Crown, from those that are the lawful Kings by the Fundamental Constitution of the Realm, to such as by the Fundamental Constitution are not the lawful Kings, but

but *Usurpers*. Now this I conceive is not in the Power of any *King and Parliament* however *Legal*, much less of such as *Henry 7th.* and his *Parliament* was. We have a *Fundamental Constitution* whereby *England* is determined to be a *Monarchy*, and that antecedently to any *Statute Law*. This *Constitution* vests a *Right* in some certain Person in every Age, who is by *Virtue* of the *Right* vested in him the *lawful and rightful King* of this *Realm*, whether this Person be he *next in Blood* to the former *King*, or another of the *Royal Line* to whom the *Crown* descends by *Virtue* of a *Limitation of the Succession* from the *next in Blood* to him; for whether the one or the other of these is the *rightful King*, he is so by *Virtue* of the *Fundamental Constitution*, which vests the right to the *Crown* in him. Now for any one *King* with a *Parliament* to make a *Law*, that for the future not the *next Heir* of the *Blood* nor any other to whom the *Succession* is limited, but any Person whatsoever that shall get into *Possession* of the *Throne*, tho it be by *deposing* a *rightful King* regnant and *usurping* his *Crown*, shall from thence forth become the *rightful and lawful King*, and the right of the *Prince* that he has dispossest'd be devolved upon the *Usurper*, is effectually to *subvert* the *Fundamental Constitution* of the *Realm*: and if it be in the *Power* of the *King* regnant, and his *Parliament* to do this, then it follows that any *King* with a *Parliament* may deprive the *lawful Issue* of his *Brother* and set up a *Basard* of his own; that they may exclude and disinheric the whole *Royal Line* and entail the *Crown* upon the *King of France* or any other *Foreign Prince*, they may lay aside the whole right of *Succession* and make the *Monarchy* *Elective*: that they may change the form of the *Government* into a *Republick*, and make the *Kings* no more then *Consuls* or *Dukes of Venice*; and vest the *Supreme Authority* in the *Senate* or *People*: In short, that *England* is no longer a *Monarchy*, or *Hereditary*, then the *King* regnant and his *Parliament* please. And yet if these things were done by any *King* and *Parliament*, I believe it would be looked upon as an *Injury* to the subsequent *Kings* or to the *Royal Line*, and they would be justified if they would not allow any such *Statute* to have any force but protest against it as *Illegal* and of *no Authority*: and yet all this might be done according to *Law*, if the *King* and *Parliament* have a *Power* to *alienate and transfer the Right* of all the subsequent

quent lawful Kings to any Usurper that shall be strong enough to depose or exclude them.

But I needed not to have proved this, which is supposed in the question, viz. that this Statute does not give away the Right of the lawful King deposed or excluded, but still leaves him King *de jure*, and reserves to him a right to claim and recover his Crown; only it obliges the Subjects notwithstanding to stand by the King in Possession, though an Usurper. I shall therefore proceed upon this Supposition, and shew that this Statute as it requires the Subjects to stand by the Usurper in Possession against their rightful and lawful King, is to be looked upon as *in it self null and invalid*. And this I understand not of the Case of an intricate dispute about the Title to the Crown, where the Subjects cannot discern who has the Right, but of the case where a King whose Right to the Crown is *clear and undoubted*, is excluded or deposed by an Usurper. And I conceive the Statute, as understood of this case, null and invalid upon these Reasons.

1st. It implies a Contradiction, that such a Person should be still the King *de jure*, and yet the Subjects (knowing him to be so) should be obliged to pay their Allegiance to another. For if he is a King *de jure* he has a Right, and that Right is to something or other, but there is nothing he can have a Right to as King, but the Allegiance of the Nation, that he should be their Governour and they his Subjects; unless we will say he has a Right only to the material Crown and Scepter, and not to that, which they are only the Ensigns of, the Government of the Nation. And if he has a Right, then the Subjects, knowing him to have it, must be under an Obligation answering to that Right.

2^{dly}. The Allegiance of the Subjects is *proprium quarto modo, omni, soli &c. semper* (to use my Lords Case (a) Expression) to the lawful and rightful King by the Fundamental Constitution of the Realm; and therefore (for the Reasons before laid down) cannot be taken away from him by any Statute Law. For as the constitution of the Realm vests the Right to the Crown in him only, so it must appropriate the Allegiance of the Subjects to him only: as it makes him alone King, so it must make the Nation Subjects to him alone: unless he may be truly a King, and yet none be under an obligation to be governed by him. If I am a (a) Father, where is my Honour? If I am a Master (a) Malach. 2. 3^{dly}. 6.

(a) Calvins
Case f. 12.

3dly, The Allegiance of the Subjects, and some parts of it especially, are due to the *lawful King only*, by the Law of Nature: and therefore no *Human Law*, can take the whole Allegiance of the Subjects, or the *indispensable parts of it*, away from him and transfer them to the Usurper. The Law of Nature extends it self to all the Conditions and Relations of Men: it considers them as *Private Persons* with relation to God and themselves only, and there prescribes to them the Duties of *Godliness and Sobriety*: It considers them as in a *Family*, and there prescribes the Duties of *Children* to their *Parents* and *Parents* to their *Children*, *Husbands* to their *Wives* and *Wives* to their *Husbands*, *Masters* to their *Servants* and *Servants* to their *Masters*: It considers them as in a *civil Society*, and there prescribes to *Subjects* their Duty to their *Prince* and to the *Prince* his Duty towards his *Subjects*. The Law of Nature does not make one *Man King* and the rest his *Subjects*; but when it once finds them made so (whether by their own or any other Persons Act) then it lays before them some Duties which they are to Practice, whether the particular Laws of the Realm enjoin them or not, and such as no *Human Authority* can dispense with as long as they stand in that Relation. Now these Duties on the *Subjects* part are signified by the Words *Fidelity* and *Allegiance*. And so we find my Lord Coke says (*Calvin's Case*, f. 13.) That *Ligeance, Faith and Obedience of the Subjects to their Sovereign* was before any *municipal or judicial Laws*. 1st, For that *Government and Subjection* were long before any *municipal or judicial Laws*. 2ly, For that it had been in vain to have prescribed Laws to any, but to such as ought *Obedience, Faith and Ligeance* before, in respect whereof they were bound to observe them. And from this he draws this Consequence, seeing then that *Faith, Obedience and Ligeance* are due by the Law of Nature, it followeth that the same cannot be changed or taken away. It is therefore plain and undeniable that there are some Duties owing by Nature to that Person who is our *lawful Prince* by the Constitution of the Kingdom; and these Duties at least as far as they can be performed for his *real Service* are due to him as long as he is supposed to continue our *lawful Prince*. And upon this ground we may justly pronounce the Stat. 11 H. 7. null and invalid: for it supposes the excluded or deposed Prince to be still the *rightful and lawful King*, and yet.

15. This Statute transfers the *whole* and *entire* Allegiance of the Subjects from the *rightful* King to the *Usurper*. Now tho the Statute of the Realm may in some cases *disengage* the Subjects from doing *some* Offices to their King which otherwise their *natural* Duty would call upon them to perform, yet no human Law can take away *all* their Duty from him, without being directly *contrary* to the *Law of Nature*, and consequently *null* and *invalid*.

2ly. This Statute obliges the Subjects to deny their rightful King those *parts* of their Allegiance which are most *indispensable*, and to act quite *contrary* to them. There can be no part of the Subjects Duty more *indispensable* then to *defend the lawful King's Person, Crown and Dignity*, to maintain his Right and Title to the Crown who is to defend his Subjects Right to their Lives and Estates. For thus they are to *hazard their Lives in Battle* against his Enemies, and that not only in *One* Battle, but also in a *Second* and *Third*, and though in all they be defeated, yet if they can they are obliged to raise *New Forces*, to make head *once more* against the Enemy. Neither is there any more reason why they should wholly give up their Princes cause when an Usurper has *got into the Throne*, then there is that they should desert him upon his *loosing the first Battle*: for then they are *disabled at present* to stand up against the Usurper and to meet him in the Field, and yet that does not free them from their Obligation to *fight him again* as soon as they have *Forces* enough and *Opportunity* to do it: and if the Usurper become not only *Master of the Field* but the *Throne* too, this is only a *higher degree of Success* and a greater Victory, which puts the Subjects in a greater *incapacity* to assert the cause of their injured Prince, but does not free them from their obligation to assert his just Right to the Crown when they are *capable*. They are therefore still under an *indispensable* obligation to *restore* their rightful King to his Throne when they have sufficient *Strength*, and a fair *Opportunity* presents it self to them.

But their Obligation to do this will farther be clear if we consider the Subjects in a *double regard*; as,

1st. Those that were truly *Loyal* and did not contribute to the deposing or excluding their rightful King and setting up the Usurper.

F

2ly.

2ly. Those that *rebelled* against their rightful Prince and set up the *Usurper* in his stead.

The *former* are obliged to *restore* their lawful Prince to his Right when they have force enough and opportunity to do it, because their *Allegiance* does not *cease* upon their King's being out of Possession of his Throne, but it is only under a *Suspension* as far as they are under an *Incapacity* of exerting it for his Service, and revives again as soon as they find themselves in a *capacity* of acting. But the others are obliged to it upon a *double* account. First by Vertue of *Allegiance*. Secondly by Vertue of that *Law of Nature* which requires every Man to make *restitution* for the *Injuries* he has done to any other, and therefore obliges them that contributed to the *deposing* or *excluding* their rightful King to make him *recompense* for that Injury by their being as active in *bringing him back* into the Possession of his Crown. It therefore to restore their rightful King be an *indispensable Duty* incumbent by the *Law of Nature* upon his *Loyal* and much more upon his *Disloyal* Subjects: then the *Stat. 11. H. 7.* is null and *invalid* as *contrary to Nature*: for it supposes the King out of Possession to have a *Right*, and yet obliges the Subjects not to *pay him his right* when they are capable: It supposes them that deposed or excluded him to have *done him wrong*, and yet obliges them not to *restore him to his Right*, nor to make him any *Reparation* for the *Injury* they have done him.

But if this be *unjust*, to oblige his Subjects *not to help* him to the recovery of his Right, it is not only so, but *Inhumane* and *Barbarous* to oblige them by Vertue of their Allegiance to *Fight against him* in Defence of the *Usurper*, and to *oppose him to the Death*, if he attempt to recover his Crown without their Assistance. For how can his *Misfortune* in the loss of his Crown, while his *Right* to it stands as good as ever, create such a change in regard of their Obligation to him, that they should now be bound to *Fight him to the Death*, for whom they were so lately obliged to *hazard their Lives*. Is he still their *lawful King* and the King in Possession an *Usurper*? how can it then be consistent with the common Principles of *Humanity* to oblige them who were born his Subjects to *Fight for his Enemy*

Enemy against him, upon no other change of Circumstances but only his being *unjustly deprived* of his Crown? This is contrary to the *Law of Nature*.

1st. Because it obliges the Subjects to fight in an *Unjust* against a *Just and Righteous Cause*, against the Person that *has the Right* for him that *has it not*, but is Guilty of the highest Injustice and Violence: for him that *has no Authority* to commissionate the Subjects to act under him, against him that is *invested* with that Authority.

2^{ly}. Because it makes the *same thing* just and unjust, and the *same Persons* both Loyal Subjects and Rebels and Traytors in the very *same Cause*, for consider it either in regard to those that deposed or excluded their King and set up an Usurper, or to those that stood firm to their Allegiance. It supposes the former to be *Rebels and Traytors in deposing or excluding* their King, and yet makes them *Loyal Subjects in standing by the Usurper*, and opposing their lawful Kings return: it supposes the latter to be *Loyal Subjects for defending* their King's Person and Crown, and yet makes them Rebels for attempting to *restore* him to his Crown tho his *Right* be still the *same* and as good as ever. To be short, what is it that makes the Subjects that depose their King and set up an Usurper Rebels and Traytors *in the very act of deposing* him and siding with the Usurper? Is it not their *withdrawing* from him that *Allegiance* which is due to him and giving it to another? and what is it that makes the others Loyal Subjects, but their *adhering firm* to their *Allegiance*? And how then shall the one become *Loyal Subjects* by continuing in the same act of *Treachery and Rebellion*, and others *Rebels* by continuing in the same Act of *Loyalty*? And might not such a Law as well oblige a Man to fight against his own *Father* in Defence of an *Adulterer* that has *turned him out of Doors*, and pretends to Lord it over his *Family*.

And this will still appear more unjust and unreasonable, if we compare the *King's Case* with the *Case of his Subjects*, as to what *Protection* he is obliged to give them. The King is obliged to maintain his Subjects in their Rights and Properties against any Invader, and that not only while they are *in Possession* of them, but also when another has *disseized* them by fraud or violence: Then the

King is obliged to *relieve* the injured Person, to do him *justice* against the *oppressor*, and to *restore* him again to his right by *Law* or by *Force*; by *Law* in a *Legal Tryal* of the Cause, and award of judgment; by *Force*, by ordering a *Posse comitatus* to Execute the Sentence of his Courts, and to *reinstate* his Subjects in the Possession of their Rights. Nay he is obliged to hazard his own *Sacred Person* and *Crown*, in a Case of necessity in Defence of his Subjects, to engage himself in a *War* with a *Foreign Prince* or *State*, for an injury done to his *Merchants* in their *Trade* and *Commerce*, to Rescue his Subjects from the Oppression of a *Powerful Faction* at home, or the *Plunder* and *Rapine* of an *Army* from abroad, to *Head* their *Armies*, and *Fight* their *Battels* himself in Person, which we find looked upon in *Scripture* (a) as a *Principal* part of the *Kingly Office*, and not dispensed (b) with but out of regard rather to the *Public Interest*, then the King's *Personal Ease* or *Safety*. And how unjust and inhuman would such a Law be taken to be, which should enact, that while the Subjects are in Possession of their Estates and Liberties, the King should be obliged to Protect and Defend them against any Oppressor or Invader: But if they were once *Ejected*, *Robbed*, *Plundered* or *Enslaved*, and their Estates or Persons in the Possession of another, that then the King should *not be obliged to concern himself* any farther for them, but rather on the contrary to *maintain* the *Oppressor* or *Invader*, in the Possession of what he has gotten by fraud or violence? And if such a Law were *unjust* and *inhuman* in the Case of a *Subject*, shall it be *just* and *obligatory* in the Case of a *Prince*? Shall his Right be so *precarious*, and his Subjects Rights so *secured* to them, that he shall be obliged to *restore* them, and they obliged to *keep him out*? He obliged to Defend them against any *Oppressor* or *Invader*, and they obliged to stand by an *Usurper* against him?

All these Reasons shew that the Law, as it is now urged (not as *indemnifying* only those that act under the King in Possession, but as obliging the Subjects in point of *Conscience*, to stand by the King in Possession against the King *de jure*) is *unreasonable*, *unjust* and *inhuman*: And then it is no Authority of Man, though it were of the most lawful King and Parliament, can oblige the Subjects to such a Law.

But

(a) 1 Sam. 8. 20.

(b) 2 Sam.

183. 21. 17.

But to all this it may be said, that it were indeed unjust thus to oblige the Subjects to transfer their Allegiance from the rightful King, were it not that the *Public Good and Peace of the Nation*, required it to be so; that when an Usurper is once settled in the Possession of the Crown, all that *Bloodshed and Confusion* may be prevented, which would be the consequence of the Subjects attempting to *dispossess the Usurper and to restore the King de jure*. To this I answer.

First, The King is worth ten thousand ^(a) of his Subjects, ^{(a) 2Sam. 18.} so that he is not to be *kept out of his Right*, merely for their *ease and quiet*: Else they might as well save themselves the trouble and hazard of fighting for the King in Possession, and oblige him to decide his quarrel with the *King de jure*, or any Foreign Prince by a *Private Duel*.

Secondly, A great part of the Nation in an *Usurpation*, are such as have *forfeited their lives* by Treason and Rebellion, by their deserting or their rising up against their lawful King: Therefore no reason as to them at least, that a Law should be made to set aside the Lawful Prince's Right for their ease and quiet, to exclude him from a *Possibility of recovering his Crown*, that they may freely enjoy the *Fruits of their Treachery and Rebellion* under the Usurper.

Thirdly, But then such a Law (if we look beyond the present time, when the Usurper is newly got into Possession) does not so much contribute to the *Peace and Security* as it does in all human prospect, to the *disturbance and ruin* of the Nation. For,

First, It obliges the exiled Prince to endeavour to obtain *Foreign Assistance* for the recovery of his Crown, and gives a just right to any Foreign Prince to make War upon the Usurper, and the Nation in the exiled Prince's behalf, as he is unjustly deprived of his Crown. Now this puts the Nation in continual danger, as long as the Usurpation lasts, of being *Conquered and brought under a Foreign Yoke*, and being made a prey to *Mercenary Soldiers*, who mind nothing but Plunder and Rapine, having no regard for a Country which is not their own.

Secondly, It gives all encouragement to *Ambitious Spirits* to attempt upon the Crown, when they find it by such a Statute

Statute as this, made as it were the *Prize* of any one that can win it by Force, and he that gets it by unjust violence, is as secure as he that has the most lawful Title, the Subjects being as much obliged to stand by him.

Thirdly, It does not only keep out the Lawful King, but also precludes his *Heirs* too from the *Succession* : For there is no Usurper but after he has settled himself in the Throne, makes it his next business to entail the Crown upon his Line, and to leave his Son in Possession of it : And the consequence of this is two Families (as of York and Lancaster) continually watching all opportunities to dethrone each other : And the reading how much blood was spilt during the contest between those two Houses, is enough to satisfy any Man, how much such a Law contributes to the Peace of a Nation, which both encourages any Usurper to seize upon the Crown, and enables him both to maintain himself in Possession, and to set up his Posterity after him, and so to lay the Foundation of a certain War upon the Nation, as often as either the Heirs of the Family of the lawful Prince, are able to make a descent here with sufficient Force, and to gain a Party here to joyn them ; or his own Family, if they are routed, are able to make a new attempt to repossess themselves of the Crown.

I shall add one Argument more against the Statute, and the consequences which are drawn from it, and that is by applying them to a particular instance. Allegiance is due by this Statute to him only that is King in Possession, and Treason lyes against him only : Therefore if Cromwell had been made King (we know it was almost come to a conclusion, that he should take that Title upon him) then these had been the consequences.

First, That King Charles the 2^ds Party had been Rebels and Traitors, if after that they had attempted to restore him to the Crown, or given him any aid or comfort.

Secondly, That they would have been obliged by virtue of their Allegiance to fight him to the death, if he himself had attempted the recovery of his Right. And all this notwithstanding the clear conviction of their Consciences, that King Charles the 2^d, was their Sole Rightful and Lawful King ; And Cromwell an Usurper.

Nay farther though *Cromwell* was not made *King*, i.e. did not assume the Title, yet seeing he had the *Exercise* of the *Regal Authority* though under another Name, the consequences in all equity and reason ought to be the same. For the Law must be supposed not to regard the Name and Title, but the *Power and Authority and Office* of a King, as it is certain he had, then the Nation were bound to pay him *Allegiance*, and those that dyed for rising against him for King *Charles's* Interest, were not *Martyrs* for their *Loyalty*, but *Traitors and Rebels* for acting against their bounden *Allegiance*. Neither can it be consistent with *Common Sense*, or *Honesty*, to urge upon the Consciences of Men, the Letter of the Law against the reason and equity of it, and to make the same thing *Treason* in one moment, and the bounden *Allegiance* of the Subjects in the next, upon the change of a Word *Treason*, to be adherent to *Cromwell*, while he had only the *Supream Authority* without the Name of *King*, but their bounden *Allegiance* to adhere to him, as soon as he had taken that Name upon him.

It will not now I hope be thought any great *Presumption* if upon these reasons I charge that Statute with *injustice*, of which my Lord *Bacon* gives so (a) fair a Character, and (a) *Dit. H. 7.* discovers in it not only the *depth of prudence and foresight*, P. 1077. but *justice* also and *magnanimity*, and a *Spirit wonderfully Pious and Noble*. The *Cunning and State Policy* of it does easily appear, but it is not so easie to discover any *Piety or Justice* in a Law, that makes *evil good and good evil*. I cannot parallel it to any other, but that which he made in his first *Parliament*, (b) That the *Inheritance of the Crown* (b) *Bac. p. 1003.* should be, rest, remain and abide in the *King*, &c. This Act made him an *Usurper* upon the rights of the *House of York*, and the other confirmed him so. This which put him in Possession of the *Crown*, had created him much trouble already, and was likely to create him more when *Perkin Warbeck* was up; yet he was resolved to stand or fall by it, and studied only how to secure himself in his unjust Possession; and rather then depart from what he had done already to the disservice of one Family, he was content to make a Law, which effectually disinherits his own Children, or any other *Lawful King or Heir of the Crown*, if they are so unhappy as to have an *Usurper* step before them into the Throne,

Throne, or *dispossess* them when they are in it. Yet both these Statutes fully discover the *Wisdom* and *Policy* of the *Legislator* ; for they carry in them the fairest *shew* and *colour* of equity and justice, but serve in *reality* to the contrary design. What more just then that the *Inheritance* of the *Crown* should be, rest, remain and abide in the *King* ? (if it were lawfully vested in him already) and what more true and easie for a *King* (lawfully possessed of the *Crown*) to call to his remembrance, then that his *Subjects* owe him *Allegiance*, and by virtue of it are bound to fight for him against a *Rebellion* or *Usurpation*, and ought not to be attainted for it by any subsequent *King* or *Parliament*. This in the *Preamble* of the *Stat. 11. of Hen. 7.* And nothing can be more agreeable to all *Laws*, *Reason* and good *Conscience*, if it be meant of the *rightful King* regnant ; But if it be meant (as really it was by *King Henry* at least) of the *King* for the time being as such whether *rightful King* or no ; It is *Absolutely* false within the *Practice* as well as *Memory* of *King Henry. 7.* who himself had attainted *Richard 3d.* the then *King* for the time being and those that fought for him in *Bosworth Field*, and should not have forgot to repeal that Statute whereby they stood attainted, when he remembered that it was against all *Laws*, *Reason* and good *Conscience* to attain any Man for Serving in the Wars, under the *King* for the time being. It appears therefore that this Law was not made *bona fide* ; and such a Law may ensnare and impose upon the *Consciences* of the *Subjects*, but is not fit to direct or oblige them : Unless we can conceive that his Saying, he remembered it to be so for the time past, when he knew it to be otherwise, is enough to make it to be so for the future.

I have considered as fairly and impartially as I could the Grounds whereupon some now give it for Law, that *Allegiance* is due only to a *King in Possession* I shall add one or two Arguments against this Position. And,

First, *Allegiance* is not due only to a *King in Possession*, because *England* is an *hereditary* Monarchy, where there is no *Interregnum*, but the *Right Heir* of the *Crown* is actually *King* at the very moment when his *Predecessor* dyes : And yet it may be a considerable time before he can take upon him the *Exercise* of the *Government*, as suppose he

has

be in a Foreign Country. If therefore he be actually King before he can be in Possession of the Exercise of the Government, then the Nation are his Subjects before he is King in Possession in the sense of this question, and consequently he has a right to their Allegiance, though not yet King in Possession.

But to this some would answer by a distinction of a two-
fold (a) right: A Right to the Possession of the Crown, and a Right to the Allegiance of the Subjects: The Right to the Possession of the Crown, they would say descends to the Right Heir immediately upon his Predecessor's decease, and in that Sense he is actually King: But the Right to the Subjects Allegiance, is annexed to the Possession of the Crown, and therefore does not accrue to the Heir of the Crown till he is in Possession. And for this distinction they produce some kind of Authority from the form of Expression in the Act of recognition (b) of Edward the 4th. Right to the Crown where he is declared to have been in right from the death of the Noble Prince his Father (Richard Duke of York, who was slain at the Battel of Wakefield, Dec. 30. 1460.) very just King of the Realm; yet because he did not take upon him to use the said Right and Title to the said Realm, till on the 4th of March following, and then entered into the Exercise of the Royal Estate, &c. and to the Reign and Government of the said Realm; From thence is dated his being in lawful Possession of the same Realm with the Royal Power, Preheminence, Estate and Dignity belonging to the Crown thereof; and his being lawfully Seized and Possessed of the Crown of England in his said Right and Title, and from thenceforth to have to him and his Heirs all Mannors, Castles, Honours, Services, Gifts of Offices, Prerogatives, &c. To this may be replied,

First, Other Parliaments express themselves in a manner inconsistent with this distinction. So most fully the Parliament. (a) 1. Mar. By and immediately after whose (a) Sess. 2. c. 4.
(Edw. 6th) Decease, the Imperial Crown of this Realm, with all Dignities, Dominions, Honours, Preheminences, Prerogatives, Stiles, Authorities and Jurisdictions, to the same united, annexed or belonging did not only descend, remain and come unto our most dread Sovereign Lady, the Queen's Majesty, but also the same was then immediately and lawfully
G invested

(a) Confident for the taking of the Oath of Allegiance. p. 32.

(b) Bagott's Case. 6. B. 4. p. 9. 10.

invested deemed and judged in Her Highness's most Royal Person, by the due course of Inheritance, and by the Laws and Statutes of the Realm. Nevertheless the same her Highness's most lawful Possession, was for a time disturbed and disquieted by the Traiterous Rebellion and Usurpation of the Lady Jane Dudley, &c. This is Prefaced in that Act, as the Ground whereupon the Queen and her Parliament saw a necessity of confirming those Recognizances, Bonds, &c. That bore date as in the First Year of the Reign of Queen Jane: viz. Because, though Queen Mary was not yet in Possession by the Lady Jane's Usurpation, yet all Authority and Jurisdiction being invested in her Person, any thing under the Name of Queen Jane wanted a just and lawful Authority. I may add to this the Recognition of (b) King James 1st, where the Parliament declares that immediately upon the Dissolution and Decease of Queen Elizabeth, the Imperial Crown of the Realm of England, and all the Kingdoms, Dominions and Rights belonging to the same, did by inherent Birthright and lawful and undoubted Succession descend and come unto his most Excellent Majesty.

(b) 1 Jac. c. 1.

(c) Sup. p.

Secondly, I have sufficiently proved above, (c) that Treason lay always against our Kings even before they were in Possession: And if so, then a Right to the Allegiance of the Subjects is not a consequent of Possession; but antecedent to it. I may add to the Proofs brought above, the resolution of all the Judges in King James's the 1st. time in the case of *Watson and Clerk*, whose Plea was, that what they had Acted against King James was not Treason, because done before his Coronation; But the Judges over-ruled the Plea upon this Ground. (a) That presently by descent his Majesty was completely and absolutely King, without any essential Ceremony *ex post facto*. Now if he was presently by descent so completely and absolutely King, that Treason lay against him, then he was so fully King that the Allegiance of the Subjects was due to him. I may add likewise that those who had acted against King Charles the 2d, between his Father's death and his coming into Possession, were thought to need an Act of Indemnity, though it pleased him to except none out of that Act; but those who were the Murderers of his Royal Father.

(a) Coke Calvin's Case. f. 30. 11.

Thirdly,

Thirdly, As to Edward the 4th's Case, this may be looked upon as particular in it, that when Richard Duke of York his Father had laid Claim to the Crown in Henry the 6th's time, he and his Son signed an Agreement, that (b) Henry the 6th should enjoy the Possession of the Crown during his life: And therefore, though Richard, and after his death Edward the 4th his Son, was in right very just King of the Realm, yet he could not lay claim to the Subjects Allegiance, till either Henry the 6th were dead, or the Agreement between them Cancelled by King Henry's breach of his part in it, and so Edward the 4th seized upon the actual Possession of the Crown: Therefore the Parliament might well date his being seized of the Rights and Prerogatives of the Crown from the day when he took upon him to use his Right and Title, and removed King Henry for the breach of the Agreement made between them.

(b) Rot. Parl.
39. H. 6. n. 18.

Fourthly, But to take this evasion as fully and clearly as I can, it may be enquired what is this Right to Possession contradistinct and antecedent to the Right to the Subjects Allegiance, it must be either,

1st. A Right in the Heir of the Crown to lay Claim to the Exercise of the Government, and to take upon himself to act as King; or,

2ly. It is a Right that the Subjects should accept and take him for their King and submit themselves to him as King, and put the Exercise of the Government into his hands.

If it be a Right to lay Claim to the Exercise of the Government, and to take upon himself to act as King, this is to be done by the Heir of the Crown on his part, who will not be wanting as far as in him lyes to put himself into Possession if this will do it. And truly the very form of Recognition of Edm. 4. above cited, may seem to favour this Notion; for that dates his being in Possession from his taking upon him to use his Right and Title to the Realm, and so also does the Lords Carriage towards his Father Richard D. of York in the Parliament 39. H. 6. (a) where upon his making out his Claim they confess his Title could not be defeated, but propose to him the saving King Henry's Honour and Estate by letting him Enjoy the Crown for his Life, if he would: which is as good

(a) Rot. Parl.
39. H. 6. n. 18.
Sup. p.

as to acknowledge, that if he would not, himself must be in *immediate Possession of the Crown.*

But if this *Right to Possession* be a Right, that the Subjects should accept and take the right Heir of the Crown for their King, and submit themselves to his Authority, and put the *Exercise of the Government* in his hands; whence is it that they are under this *Obligation*? Is it not by *Vertue of their natural and sworn Allegiance* to the *King his Heirs and Successors*? So *Queen Mary* looked upon it in her *Letter* to the Lords of the Council upon *King Edward's* Death, (b) *We require you and charge you and every of you, of your Allegiance, which you owe to God and Us and none other, that every of you for our Honour and the Surety of our Person only Employ your selves; and forthwith upon the Receipt hereof, cause our Right and Title to the Crown and Governance of the Realm to be proclaimed in our City of London and other places.—And this our Letter signed with our Hand shall be your sufficient Warrant in that behalf.* Neither do they return her for Answer that they owed her *no Allegiance*, she being not in *Possession of the Crown*; but say, *For as much as our Sovereign Lady Queen Jane is after the Death of our Sovereign Lord, Edw. 6. —invested and possess with the just and right Title in the Imperial Crown of this Realm.—We must therefore as of most bounden Duty and Allegiance assent unto her said Grace and none other, except we should (as faithful Subjects cannot) fall into grievous and unspeakable Enormities.* And this Answer they send to *Queen Mary* before they proceed to *Proclaim Queen Jane*: and I need not add that some of them were soon after attainted of *High Treason* for this breach of their *Allegiance to Queen Mary.*

If therefore the *Right to the Possession of the Crown*, be a Right in the true Heir of the Crown, that Subjects should accept and take him for their King, and put the *Exercise of the Government* into his hands; and the Subjects are obliged to take him for their King, and to put the *Exercise of the Government* into his hands by *Vertue of their bounden Allegiance*, on pain of incurring the Guilt of *High Treason*, if they take any other for their King: then the *Allegiance of the Subjects* is due to the Heir of the Crown before he is in *Possession* of it; then their

(b) Fox's Afts
and Mon. Vol.
3. p. 14. Hey-
lin's Hist. Re-
form. p. 157.

their putting him in Possession, with all the Ceremony of Proclaiming, Recognizing, Crowning him, doing Homage, and taking an Oath of Allegiance to him is but a part and the first Fruits of their Allegiance, and their one whole entire Allegiance consists both in their first owning and accepting him for their King, and ever after serving, honouring, and obeying him as such: as the one whole entire Duty we owe to God, comprehends our Belief and Acknowledgment of him for our God, and the payment of all Worship, Service and Obedience to him.

And this is not to be applyed only to the Heir of the Crown consider'd before he is in Possession, but to a King *de jure* dispossessed of his Throne. I argued above that the very Statute, 11 H. 7. which requires the Subjects to fight against him, supposes him still to be King *de jure*: if so, he has a Right; true, but that is only a (a) *mediate Right to recover first the Possession* of his Throne, and not till then does his right return to the Allegiance of the Subjects; but if he have a Right to be in Possession again, then he has a right that his Subjects should again accept and take him for their King and restore him to the Exercise of the Government, and this is nothing but their returning to their Allegiance; so that his being the King *de jure* implies a direct Right to his Subjects Allegiance, and therefore the Stat. 11. H. 7. is a mere contradiction to it self, for it supposes him to be King *de jure*, and yet requires the Subjects to transfer their Allegiance from him to the King *de facto*.

(a) Considerat. for taking Oath of Alleg. p. 32.

Besides I have shewed that the Heir of the Crown is actually King at the very moment when his Predecessor dyes: now a King is a relative Term, and the correlative of it are the Subjects, the Nation therefore must become the Subjects of the Heir of the Crown at the Death of his Predecessor, and the Relation of Subjects implies that their Allegiance must be due to him.

2ly. A Second Argument to prove, that the Allegiance of the Subjects is not due to a King in Possession only, may be drawn from the difficulty of determining, who is King in Possession, and what is sufficient to make him so: whether his being Proclaimed or Crowned, his being submitted to and received as King by the Council, the Nobility; the Assembly

Assembly of the *Three Estates*, or the whole *Realm*: whether *all this* is required to make him truly *King in Possession*, or *how much* is sufficient to make him so. This the *Law* does not tell us: it tells us rather that the *King de jure* is completely and absolutely *King without* any thing of all this *Ceremony*; and for a *King de facto* the *Law* does not say *how* he is to be made, it does not set a *Rule* to a Proceeding that is wholly *irregular*, nor prescribe the *modus* of an Action which is the most *contrary* to *Law* that the Subjects can do. Neither does *Reason* clear the difficulty: For,

1st. All the other requisites (saving only the being submitted to by the whole *Realm*) are consistent with our having many Kings in Possession at once: for there may be many proclaimed in several places, and each have a *Council*, call a *Parliament*, and have a great number of the *Nobility*, *Clergy* and *People* that adhere to them: now either all these would be Kings in Possession, or none; and if they were all in Possession, then either the Subjects must pay Allegiance to all at once, or each to the King that has him in his Possession; and I think right Reason as well as the Peace of the Kingdom would prescribe, that the Nation ought rather to lay them all aside, but him that has the true Right and Title.

2ly. If the being submitted to by the whole *Realm* be that which makes King in Possession; then,

1. It will be to be enquired what is to be looked upon as the submission of the whole *Realm*. The Representatives cannot act in the name of the whole *Nation*, without every Man's Consent, in any thing contrary to the Legal Constitution or the Subjects Allegiance, for then if they should pass a *reasonable Vote*, the whole *Nation* must answer for it. And if every individual Subject's consent is required to a *King de facto*, it may be long before he can be in full Possession.

2ly. In this Sense the Notion of a King in Possession will interfere with it self: for if the submission of the whole *Nation* be that which makes a *King de facto*, and puts him into Possession of the Crown, then his being in Possession cannot be made an Argument why the greatest part of the *Nation*, or a lesser part, who have not yet submitted, should sub-

he is in Possession before he is truly in Possession, if the Subject submit to him : for this is requiring them to submit, because submission of the whole Nation be necessary to make him so : and indeed according to this Notion a King *de facto's* being in Possession can be only urged as a Reason why those that have sworn Allegiance should bear Faith and Allegiance to him ; and not as a reason why any should swear Allegiance. But the true Notion of a King in Possession will rather at last be found to be, the Person that has the Power in his hands, and is strong enough to enforce the Submission of those that adhere to the King *de jure*, and this brings me to consider one of the greatest Objections against what I have said : and that is,

Ob. 1. That Protection and Allegiance are reciprocal ; and therefore because we are under the Protection of the King in Possession only, our Allegiance is due to him only. To this I answer,

This Maxim may be understood in Three Senses.

1. That the Relations of King and Subject are reciprocal.

2. That the Duties of Protection on the King's, and Allegiance on the Subject's part are reciprocal.

3. That actual Protection and Allegiance are reciprocal.

1st. That the Relations of King and Subject are reciprocal : i. e. if such a Person be our King, then we are his Subjects, if we are his Subjects, then he is our King ; And on the contrary if he be not our King, then we are not his Subjects, if we are not his Subjects, then he is not our King : According to the known Rule in Logic, *Relata reciprocantur*, i. e. *se mutuo ponunt & tollunt*. Now this is so far from proving, that Allegiance is due to the King in Possession, though not *de jure*, that it is the very Ground of all our Arguments to prove the contrary : For it is not he that is our King, but the King *de jure*, and therefore it is not to him that the Nation is to be Subject, but to the King *de jure* : For the Relation of King consists not in the Exercise of the Government, but the Regal Authority ; and the Ground of this Relation is a Right to the Crown, by Birth or Succession in an hereditary, by the choice of the Electors in an Elective Monarchy, and not in either by mere Possession or Invasion ; for if that gave a right then,

1st.

1st. The old maxim must be false, *jus non nascitur ex injuria*; and he must not be called a Thief or Robber that comes not in by the door into the sheepfold but the true Sheep-beard.

2. A People would then have no right to restore themselves to Liberty, nor a Prince to recover his Crown, from an Usurper.

3. Then we lay aside the distinction between the King *de facto* and *de jure* which is the Ground of the whole dispute.

2. A second Sense of this Maxim may be this, that the duties of Protection on the King's, and Allegiance on the Subjects part are reciprocal, and do mutually infer and take away each other, *viz.* As the Subjects are bound to bear Allegiance to the King, so the King is bound to give Protection to his Subjects: And on the contrary. As the King is not bound to Protect those that are not his Subjects and owe him no Allegiance, so the Subjects are not bound to pay their Allegiance to him that is not their King, and owes them no Protection. Now this also is very true, that God and Nature has laid mutual obligations upon Kings and their Subjects, as he has in all other Relations between Man and Man, as of Parents and their Children and the like. And this is the Sense of the Maxim in our Law, as appears from the plain and express words of the Lord Chief Justice Coke. (a) *Between the Sovereign and Subjects there is duplex & reciprocum ligamen, quia sicut subditus Regi tenetur ad obedientiam, ita Rex subdito tenetur ad protectionem; mento igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen*—and with this agreeth Mr. Skene in his Book *de expositione verborum*—Ligeance is the mutual Bond and Obligation between the King and his Subjects, whereby the Subjects are called his Liege-Subjects, because they are bound to obey and serve him; And the King is called their Liege-Lord, because he should maintain and defend them.—Therefore it is truly said, that *Protectio trahit Subjectionem* and *Subjectio Protectionem*.

But then though these Duties are reciprocal, yet the ground of the obligation to perform them is the relation to which these Duties are annexed, and not the reciprocal Obligation on the other side. A Father is bound to take care of his Children, not because they are under a mutual Obligation.

(a) Calvin's
Case. f. 4.

Obligation to Honour their Parents, but because he is their *Father*: And a Son is not bound to perform his Duty to his *Father*, because his *Father* is *reciprocally obliged* to take care of him, but because he is his *Son*: So the *ground* of the Subjects *Duty* to their *King* is not because he is *bound* to *protect* them, but because they are his *Subjects*; and the *King* is bound to protect his *Subjects*, not because they are also *obliged to pay him Allegiance*, but because he is their *King*. God and Nature designs Men to live in a *Family* and *Civil Society*, and has appointed a means to preserve them there, by their *mutual Duties* to each other. It is therefore the *Will of God* annexing such Duties to each *Relation* of Father and Son, King and Subject, which is the ground why they are *due*, and why the one part is *obliged* to perform these Duties, and the other has a *Right* to enjoy the benefit of that performance; and God's making the *Obligation reciprocal* is not the *ground* of the Duties on either side, but an *Encouragement* and *Motive* to the performance of them. And hence it will follow,

1. That the *Obligations* to the Duties of *Protection*, or *Allegiance*, hold as long as the *Relations* of *King* and *Subjects*.

2. That where there are not the *mutual Relations* of *King* and *Subject*, there, there are not these *Obligations* to perform the Duties of *Protection* or *Allegiance* annexed to these *Relations*. And this will be a good *ground* to judge of the Truth of this *Maxime* in the 3^d. Sense, which is,

3. That *actual Protection* and *Allegiance* are reciprocal, viz. That the *Subjects* are bound to pay their *Allegiance* to him from whom they receive *actual Protection*, but are not obliged to pay their *Allegiance* to him who does not *actually Protect* them. And in this sense it is brought as an *Argument* to enforce our paying *Allegiance* to a *King in Possession*, though not *de Jure*: But it will easily appear that it is as false in this Sense, as it is true in the other two Senses: For if the *Relations* of *King* and *Subject* be reciprocal, and the *Duty* of *Allegiance* be annexed to the *Relation* of a *Subject*, and holds as long as the *Subjects* stand in that *Relation*; then, if the *King de Jure* be still their *King*, and they his *Subjects*, though they have not *actual Protection* from him, yet their *Allegiance* is due to him as far as they are capable of exerting it,

H

for

for his Service. Again, if there be no obligation to perform the Duty of Allegiance, but where there is the *Relation* of a Subject to which that Duty is annexed, then if the *Nation* are not *Subjects* to a *King de Facto*, nor he their *King*, they are not bound to pay him Allegiance, though he is ready to give them *actual Protection*; so that Protection without the true *Relation* of *King*, does not infer an Obligation to Allegiance, nor the want of Protection take away that Obligation in him, who is still under the *Relation of a Subject* to another that is his *King*. Which is farther clear, because *actual Allegiance* and Protection are not reciprocal, i. e. *actual Performance* of the Duty of Allegiance does not infer an Obligation in the *King* to give *Protection* to every *Alien*, who is willing to make himself the *King's Subject*; neither does the neglect of paying his Duty of *Allegiance* in any Subject discharge the *King* of his Duty of giving him his *Protection*, as far as is consistent with the other part of the *King's Duty*, to govern his Subjects; for he is still obliged to give him all that which the Law allows to a *Criminal*, a *Legal Tryal* by a Jury, &c. and may be obliged to extend his *Royal Clemency* to him, where it may tend to the Reformation of the Person, and is consistent with the due ends of Government. To be short, there is not any Man but enjoys the Benefits of his *Father's Care*, and his *Prince's Protection*, for a long time before he is capable to perform either the Duty of a *Son*, or the *Allegiance* of a *Subject*, viz. from the moment of his *Birth* to his riper Years; and therefore if *actual Allegiance* be the ground of the *King's Duty* to Protect his *Subjects*, he is not obliged to extend his Protection to an *Infant* or a *Child*; or if the *incapacity* or *neglect* of his *Subjects* do not discharge him from performing towards them the Duty of a *King*, why should his *incapacity* or *faults* discharge them from performing their Duty of Allegiance to him, much less authorize them to transfer what is his Right to another, because from him only they have *actual Protection*? But to proceed farther in Confutation of this false Principle, that *actual Protection* and *Allegiance* are reciprocal.

1. This Principle obliges the *Subjects* to pay Obedience to every *Usurpation*, whether the Person that *Usurps* be

one, or more; whether he be *King* or no: So any one in the late times would have been obliged upon this Principle to have born Faith and true Allegiance to the *Rump*, the *Committee of Safety*, the *Protector*, and all other *Usurped Powers*, who got the Government into their Hands during that time; for they having got the Sovereign Power into their Hands, from thenceforth all the People of *England* were under their *Protection*, and therefore might have sworn to bear Faith and true Allegiance to them, and were obliged to Assist and Defend them in the Possession of their *Usurped Authority*, and to fight for them against the *King* and the *Royal Family*, and they that acted against them were to be judged *Rebels* and *Traytors*.

(2.) The Truth of this Principle seems to depend upon one of these two Grounds; either 1st. because the Subjects enjoy all the Common *Benefits of Civil Government* from this *Protection* of the *King de Facto*, and in return for them are bound to pay him their Allegiance by the Law of *Gratitude*. Or 2^{ly}. because the *King de Facto* has the *Lives* and *Fortunes* of the Subjects at his *Mercy*, and therefore it is at least Lawful for them, when their rightful King cannot rescue them out of his Hands, to swear a new Allegiance to him.

1. The Subjects enjoy all the Common *Benefits of Civil Government*, from this *Protection* of the *King de Facto*, and therefore in return for them are obliged to pay him their Allegiance by the Law of *Gratitude*. To this I answer,

1st. I granted above that the Subjects are to pay some degree of Submission and Obedience to a King in Possession, though an Usurper, for their own *Safety*, and the publick Order and Peace of the Nation, and upon the presumed Will of the *King de Jure*.

2. It does not appear that they are obliged to pay him even this degree of Submission and Obedience on the score of *Gratitude*; for the Power and Authority whereby he takes upon him to protect them is not *his own* but the *lawful King's*; and he first *deprives* the Subjects of the *lawful King's Protection* before he tenders them his own, and therefore in effect *takes away* from them as much as he *gives*; and besides invades the Subjects

Rights who were not obliged to be Subject to any but their *Lawful Prince*, and his not depriving them of *Protection*, is only forbearing doing them a farther *Injury*; so that though they reap some benefit from his *Protection*, and ought in *Prudence* to comply with him as far as it is *Lawful*, yet it does not seem that they are obliged to it upon the score of *Gratitude*.

3. But though they were obliged in point of gratitude to pay him *some degree* of Submission and Obedience, it does not follow, that they can lawfully *transfer their Allegiance* to him; for that is not their own to give, but there is still a reserve of it due to the rightful King, when it can be Exerted for his Service.

2. But Secondly, The *King de Facto* has their *Lives* and *Fortunes* at his *Mercy*, and therefore it is at least *Lawful* for them, when the *King de Jure* cannot Rescue them out of his Hands, to save their *Lives*, and *Means of subsistence*, by swearing Allegiance to that Person who has them in his *Power*. To this I Answer, That swearing *Allegiance* implies two things.

1. A full and entire *Submission*, so as never to attempt any thing *against* the *King de Facto*, for the *King de Jure*. And this, when they must do it or *die*, may seem to be *Lawful*, because their *Death* deprives the *King* of so many of his Subjects, and their *engaging never to Act for him* does no more; and is but the same as if they should *take Quarter* of an *Enemy in War*, that has them at his *Mercy*: And this may be true, where there is no Service to be done to their *King's Cause*, and the true Profession of the Principles of *Loyalty*, by their *suffering Death*, and Sacrificing their own *Lives* towards the recovery of a Nation from a Principle of *Rebellion* to a true Sense of their Allegiance: But in most *Unhappy* there is first a *Rebellion* of the Subjects, and an *apostasy* from the Principles of *Loyalty*; and in this case it may be considered, whether any, whose *Examples* might have influence upon the rest of the Nation, may not be obliged even to *lose their Lives* for the *King de Jure*; because here their Deaths may do *some service* to Religion and the *King's Cause*, whereas in *War* their dying rather than to *take Quarter*, and make themselves *Captives* to an *Enemy* that has their *Lives* at his *Mercy*, would do their *King* no Service at all.

2. Alle-

2. *Allegiance* imports an Engagement of the Subjects to stand by and maintain the King in Possession against the King *de Jure*; and this if any of them engages to do, the King *de Jure* does more than than lose a Subject, for he gets an Enemy, who, if he Act according to his new Engagement, is obliged even to oppose him to the Death, if he endeavours to recover his Crown: But why may not this be done, since the end for which Men are placed under a Government is the Preservation of their Lives and Properties; and therefore when that Protection fails them, whereby they should be Preserved without any fault of their own, their *rightful King* being deposed or excluded, and unable at present to recover his Right, and they at present reduced to those Streights, that they must either make themselves the Subjects of the King in Possession, or suffer Death, or lose the necessary means of Subsistence; why may they not in this case give themselves up to him that has them in his Power, and swear Allegiance to him? This then is the main Ground. The end for which we are placed under a Government is Protection; when that Protection fails us, and our Lives and Fortunes are at Stake, then we may for our own Preservation put our selves under another Protection, and swear Allegiance to the Person who has us in his Power. Let us consider whether this Principle will carry us,

1st. It allows us to swear Allegiance to any Person that gets our Persons, and the means of our Subsistence into his hands, and before we can have Protection from the Government, will either kill or ruine us if we do not renounce our King, and put our selves under his Command, to stand by him against all Persons whatsoever. This Person may be the head of a Rabble, a Jack Cade, a Robin Hood, a Massaniello, or who not? For it is not the Person that Authorizes our Subjecting our selves to his Government, but the Power he has to force us to it, at the Peril of our Lives.

2^{dly}. It is not only our duty to the King, that this Principle justifies the Deferring of, but also all other Obligations which are incumbent upon us, as we are Members of a Civil Society, and Subjects to a Government: For instance (in our constitution) the obligation we are under to the Succession of the Royal Line, to the Fundamental Constitution

Constitution of the Monarchy (as it is not *Despotick* and *Arbitrary*, but *limited by Law* in the Exercise of the Royal Authority) and also to the present *Legal Establishment*, wherein are included the *Rights of all our fellow Subjects* to their Lives, Liberties, and Properties: To these Rights we are obliged, as Subjects of the English Monarchy; as well as to the King's Person, Crown, and Dignity. Now suppose a King should design to destroy any one of these, for instance the *Right of Succession* in the next Heir; suppose he were resolved to force the Nation, by the Assistance of a Party that would stand by him, to *set aside the next Heir*, and to *swear Allegiance to another Person*; suppose he should begin to impose this Oath upon some of them, whose *lives* or their means *means of Subsistence* were most in his Power, and require them upon pain of Death, to take an Oath contrary to the *Right of Succession*. Suppose the Successor not able to hinder this, and the Nation either not able to resist, or not all of a mind in that point: What here must these Men do? They are indeed Members of this Society, and were made so (suppose) by the Act of their Forefathers, who subjected themselves and their Posterity to an *Hereditary Monarchy*, as the best form of Government, and likely to give them the best and surest Protection. Here the poor Men find they fail of their end, the King has their *Lives in his Power*, and will take them away, unless they renounce their natural and sworn Obligations, to the *Right of Succession*; the Successor is not present or able to Protect them, and they can do him no service now, but only to *dye Martyrs* for his right, and this they are not engaged to do as Members of this Society, and Subjects of this Government, neither are they obliged to it for the Right of the King himself, but may if another gets his Crown, and has their *Lives at his Mercy*, transfer their Allegiance to him, and therefore much rather may renounce the right of the next Heir. when they must either do it, or *dye*.

I might make just the same supposition as to our obligations, to the *Established Form of Government*, and to the Lives, Liberties, and Properties of the rest of our fellow Subjects included therein; suppose a King designs to *overthrow all these*, and to make those of his Subjects that most depend

depend upon him, swear that they will *concur* with him in betraying the Rights of their Fellow-Subjects included therein; suppose he require some of them to take this *Oath* at the Peril of their Lives, or the loss of all their *means of Subsistence* if they refuse; they scruple it, because it is contrary to their *Obligations* to the *Legal Establishment*. But what is the Ground of that Duty? The *Protection* they enjoy under this Form of Government: Here that *Protection* fails them, the King is too hard for his People, and they cannot, or think they *ought not*, rise up in the common Cause, why then these Persons have nothing to do but to submit, and swear to stand by the King in the Exercise of his *Arbitrary and Despotick Power*: For why should they be obliged either to die or starve, rather than the rest of the Nation (who cannot protect them) should be brought under another Form of Government, and made to submit themselves to a lower degree of Subjection?

These I think are the plain Consequences of this Principle: We are under an Obligation to the Rights of the King, his Heirs and Successors, and our Fellow-Subjects. If when our Lives are at Mercy, and the King is not able to protect us, we may then renounce his Right, and swear Allegiance to another King; then by parity of Reason, when our Lives are at stake, and the Successor, or our Fellow-Subjects, are not able to rescue us, we may then renounce the Right of Succession, or swear to joyn in subverting the *Legal Establishment*, and the Liberties and Properties of our Fellow-Subjects secured thereby: For we are brought under Obligations only for our own Preservation, and are not obliged to die Martyrs for any Humane Right, but may, to save our own Lives, engage to do any thing against the Rights of our King, his Heirs, and our Country.

There was a time when most of the Nobility and Gentry, and every one in Publick Station in the Court, Westminster-Hall, the Army, and the Country, were brought under such a Trial as this, and required either to quit their Places, or to joyn with the King in taking off the Penal Laws and Tests; some of these there were whose Places were a Livelihood to themselves and their Families, and the Quality they had lived in, made it the same thing in a

spanner

manent to them to *dye* as to *beg*. We know what then was the Sense of the Nation, that *any thing* ought to be suffered, rather than contribute the Assistance of *one Vote* to the doing of that, the effect whereof might be the introducing of *Popery and Arbitrary Government*. And yet if this be a good Principle, that *to save our Lives, or means of Subsistence, we may renounce any Humane Right*, I think these Persons needed not to have been *State-Martyrs*, but might lawfully have complied with him who had the *means of their Subsistence in his Power*.

Or if we are obliged not to betray the *Rights and Liberties* of our *Fellow-Subjects*, nor the *Right of Succession*, but rather to submit to *dye* or *starve* than to *joyn* with the *King* in the *Subversion* of either of these; why are we not under the same *Obligation* to the *King's Person, Crown, and Dignity*? Why are we not equally obliged not to *renounce his Right* though at the *Peril of our Lives*? A conscientious Man could not (though for the saving of his Life) *joyn* with any other in an Act of *Injustice or Violence* upon the Person or Estate of the *meanest* of his *Fellow-Subjects*; and if so, sure he ought rather to *dye* a thousand Deaths than to make *himself a partaker with other Men* in their Sins of *Usurpation or Rebellion*, by engaging to *joyn* with a *King de Facto*, and his Adherents, to keep a *King de Jure* from his *Rights*. There have been who were thus persuaded when they were brought under a severe Tryal for their Loyalty to *King Charles the Martyr*, and his Family; and there have been who have had occasion to shew themselves as true to the *Right of Succession*, and the *Legal Establishment* in Church and State. It is indeed very unhappy to be under such a *Constitution*, where a Man is so often brought in danger of losing his *Life*, or *means of Subsistence*, or parting with his *Integrity*; but if *England* be such a place where there is no living except a Man will be ready at every turn to renounce either his *King*, or the *Succession*, or the *Rights of his Country*; if, I say, *England* be such a place, and yet the *English* be looked upon as the *best Constitution* in the World, I think then an honest Man need look no farther, but prepare to go into a better Country, i. e. *an Heavenly*.

I shall answer one *Objection* more, and that is drawn from the Case of a *Tenant* to a private Estate, who swears *fealty* and pays all his *Rents and Services* to the *Lord of the Manour in Possession*, tho he have not the *Right Title* to the Estate: therefore the Subjects by parity of Reason, ought to pay their *Allegiance* to a *King in Possession*, tho not *de jure*. I answer, this is plainly a *different case*, and the ground of the difference lyes here, that in all Controversies between *Private Persons* about a Title to an Estate there is a *Court of Judicature* provided, to determine who has the *Right Title*, but in a Competition of two *Princes* for the *Crown* there is no such *Court of Judicature* provided. For where there is such a Court of Judicature, there the very Reason of Government requires, that any Person who is in Possession of an Estate (tho it be by unjustly disseizing or excluding another who has the Right to it) is to be looked upon (as to the *jus externum*) by every Subject of that Government as if he were the *rightful Possessor*, till upon a *Trial in Court* he be adjudged not to be so; and it upon a *Trial* he, tho against *Truth and Right* (by Perjury of Witnesses, a corrupt Judgment, or false Verdict) be adjudged by the Court to be the *rightful Possessor*, he is then still by the Subjects of that Government to be looked upon and treated as such, till the other Person who is thus injured can have his remedy against him in a *legal Way*, and recover his Estate by another *Trial*. Hence therefore it follows, that the *disseized or excluded Landlord* is not any other way to disturb the others unjust Possession but by having recourse to the *Law*, and the *Tenants* are to swear *fealty* to the Lord in Possession, and to pay him their *Rents and Services*, and can do no other Service to their *rightful Landlord* then by giving him their Assistance towards the recovery of his Right in a *Legal way*: for their paying their *Rents and Services* to another cannot be an Injury to the *rightful Landlord*, because as a Member of the Government he submits his Rights to the *Legal Constitution*, and besides may recover *Damages* of the unjust Possessor for the profits of the Estate, which he has enjoyed during the time he has been in Possession: but it would be an Injury to the *Tenants* to pay their Rent

twice over, once to him to whom the *Law* constrains them to pay it, and again to him to whom their *Consciences* tell them it should be paid of Right.

And the same would be the Case in a Competition of two Princes for the Crown, if there were a Court of Judicature settled in the Kingdom to take Cognizance of their Claims, and to determine the Controversy between them judicially, and to oblige the Parties contending for the Crown to acquiesce in their Judgment, and the Subjects to stand by him whose Right they determine it to be: for then any King in Possession were to be looked upon and obeyed as King *de jure* till by a Sentence of this Court he were pronounced to be an Usurper, and another Prince declared to be the rightful King: and the Prince deprived or excluded by the Sentence of this Court were to sit down and quit his Pretensions; and the Subjects would be to be directed wholly by this Court, and to swear Allegiance to that Person and to stand by him with their Lives and Fortunes, to whom this high Court should adjudge the Right to the Crown. But then, if there be no such Court, it will then be left to the Subjects to inform their own Consciences, who it is in whom the Crown is invested, deemed and judged (to use the Expression of the Stat. 1

(a) Self. 2. c. 4.

(a) Mar.) by the Law, not any such Court, and when they know it they are to follow the *jus internum* and to stand by him who has the Right—tho a Tenant in the case of a Private Landlord is obliged to follow the *jus externum*, and to be directed by the Courts of Judicature, where he is to pay his Rents and Services, and to swear fealty.

I need not take upon me to prove, that there is no such Court settled in our Constitution. It is not the Nobility or Council of the former King, for their Proclaiming of the New King is not a judicial decretory Sentence of his Right and Title, but the first Act of their Allegiance to him, presupposing his Right; if it were otherwise, Queen Jane had then been the lawful i. e. Legal Queen of England, and not Queen Mary; But we find it so far from that, that the Lords of the Council were looked upon as Guilty of Treason in Proclaiming Queen Jane, and adhering to her when Proclaimed. Neither is it the three Estates assembled in Parliament;

Parliament; for then 1st. They should meet immediately upon the decease of any King, to determin any dispute that might be about the Title to the Crown, whereas their meeting depends upon the Writs of the new King to call them together, 2^{dly}. Their Acts of recognition should be first passed before any other, but we find them (as it may seem designedly) placed after some others in the Parliaments 1 Mar. and 1 Eliz. Indeed a Parliament were a fit Court to determin such a controversie, if it could be free and impartial upon an Usurpation, and were not under the awe of him, that by the Power of the Sword lays the strongest claim to the Crown. I shall shew how fit a Parliament may be to be set up for an infallible Judge of Controversies of this Nature, by transcribing a part of the Act of Recognition of Ric. 3^d. (Printed at large at the end of the (a) exact abridgment of the Records:) (a) p. 712, 713, 714.

We consider that you be the undoubted Heir of Richard Duke of York, very Inheritor of the Crown and Dignity Royal, and as in right King of England; by way of inheritance—We consider also your great (b) Wit, Prudence, Justice, Princely Courage—Wherefore these Premises duly by us considered we desiring effectually the Peace, Tranquillity and Weal-public of this Land—And having in your great Prudent Justice, Princely Courage and Excellent Vertue singular confidence, have chosen in all that in us is, and by that our Writing choose you, High and Mighty Prince, our King and Sovereign Lord, &c. To whom we know of certain it appertaineth of inheritance so to be chosen. And hereupon we humbly desire, pray and require your most Noble Grace, that according to the Election of us the three Estates of your Land, as by inheritance, you will accept and take upon you the said Crown and Royal Dignity—as to you of right belonging, as well by inheritance as by lawful Election. (b) Mr. Pryn's note. His pretended virtues and fitness to Reign: Without one word of his desperate Treasons, Regicides, Murders, Hypocrisie and other vices.

Albeit that the Right, Title and Estate which our Sovereign Lord King Richard the 3^d. hath to, and in, the Crown and Royal Dignity of this Realm of England—been just and lawful, as Grounded upon the Laws of God and Nature, and also upon the Ancient Laws and laudable Customs of this said Realm: And also taken and reputed by all such Persons as been learned in the above said Laws and Customs.

(4) Mr. Ps. note. Yet he that considers 39 H. 6. n. 8. to 33. and 1 E. 4. n. 8. to 40. will scarce believe this for a truth, neither proved it so in his own case.

Yet nevertheless forasmuch as it is considered that the most part of the People is not sufficiently learned in the abovesaid Laws and Customs, whereby the truth and right in this behalf of likelihood may be hid, and not clearly known to all the People, and thereupon put in doubt and question. And over this, how that the (a) Court of Parliament is of such Authority, and the People of this Land of such a nature and disposition as experience teacheth that manifestation and declaration of any truth and right made by the three Estates of this Realm, assembled in Parliament, and by Authority of the same maketh before all things most faith and certain quieting of Mens minds, and removeth the occasion of doubts and seditious language.

Therefore at the request and by the Assent of the three Estates of this Realm—and by the Authority of the same, be it pronounced, decreed and declared, that our Sovereign Lord the King, was, and is, the very undoubted King of this Realm of England—as well by right of consanguinity and inheritance as by lawful Election, Consecration and Coronation.

I do not observe that the Recognition was first drawn up and presented to King Richard at his Coronation by a Party of his own Creatures, taking upon themselves to Recognise and Elect Him their King in the name of the Three Estates of the Realm. However, afterwards it was not found difficult to bring the Three Estates in full Parliament to make this their own Act, and not only to submit to King Richard as King de facto, but to recognize Him to be King de jure. Prynne's Remarks upon it in the Margin are sufficient to shew their Honesty and Sincerity in this proceeding, how well qualified they appear'd themselves for an Infalible Judge of Controversies about the Right to the Crown; by their base and servile Flattery in extolling the singular Vertues of that bloody Tyrant; by their declaring Him the true and undoubted Heir of the Crown; by their establishing a new and unheard of Right of Inheritance whereby it belong'd to an Hereditary King to be chosen by the Parliament; and lastly, after they had acted thus, contrary to the Light and Conviction of their own Consciences, pretending to an Incontestable Authority to quiet the Consciences of the Nation. How they quieted their Consciences, appears by the Sequel of the History, when the Nation within two Years call'd in Hen. 7th. to depose this Tyrant, upon his Oath to Marry the Daughter of Edw. the 4th. the Heir of the Crown: and there we find the Parliament soon change their Note, and pronounce the late True and Undoubted Heir of the Crown a Traitor and Usurper.

An Advertisement to the Reader, in relation to the foregoing Discourse.

There are some passages in this discourse, which may seem to allow too much to an Usurper in Possession, *viz.* That some degree of Submission may, and ought to be paid to his Acts of Government; that some of his Judicial Acts, Grants, &c. ought in equity to be looked upon as valid; and that some Acts against him may be punished as Treason. To prevent these passages being mistaken or perverted, I thought it proper to add some farther explanation of them.

The Question touching the Subject's compliance under an Usurper in Possession, supposes these two things:

1. That the Usurper is got into the Throne, and that he has seized the Power of the Nation into his Hands; so that the Subjects, who still adhere to their Loyalty and Allegiance, are not at present able to make Head against him to remove him from the Throne, and to restore their Lawful King to his Right.

2. That whether the Loyal Party will or no, the Government will from thenceforth proceed under the Name, and as by the Authority of the Usurper, till the Lawful Prince, and his Party, are in a condition to displace him. *i. e.* The Usurper will Name his Council, Judges, and inferiour Magistrates, Officers of his Court, and his Army, &c. will call Parliaments, make Laws, levy Taxes, grant Commissions, and take upon him to execute all other Acts of Royal Authority; and will have a Party to act under him in all Places of Trust, and Power, during his Usurpation.

Upon this ground, therefore, it will not be difficult to explain the abovementioned passages, and to shew that they do not allow too much to an Usurper in Possession. As,

First, That some degree of Submission and Obedience may be paid to his Acts of Government, *i. e.* Whilst the Loyal Party are not able to make head against him, to deprive him of the Crown, they may be allowed and obliged to pay a Submission and Obedience to those Acts of Government done by the Usurper, which tend to the Publick Safety and Welfare, and are not prejudicial to the Right and Interest of their Lawful King. For this Submission and Obedience,

1. Does not imply any Recognition of the least Right or Authority in the Usurper; for the ground of it is not any such Authority, but a prudent regard to their own Safety, the Publick Good, and their absent Prince's Interest involved in both; whose Will therefore they must presume allowing, nay requiring them to act thus, as most for his Service in their present circumstances.

2. It does not at all contribute to the *Settlement* of the *Usurpation*, and the *Confirmation* of the *Government* in the Hands of the *Usurper*; for the *Government* will proceed, as by his *Authority*, whether they will or no, till they are in a condition to oppose it effectually; and may be more settled, if they should throw away their own *Lives*, and ruine the *Cause* of their *Lawful Prince*, by any rash and weak attempt.

3. It does not disengage them from imbracing all opportunities of acting any thing, that may be really serviceable to their *Lawful Prince's Interest*, and may make way for his recovery of his *just Rights*.

Secondly, It is allowed in the Discourse, That some *Judicial Acts*, and *Grants*, &c. of an *Usurper*, ought in *Equity* to be looked upon as *valid*, viz. Such as are not to the prejudice of the *Interest* of the *Lawful King*, or of the *Publick*. This is grounded upon the same supposition, that the *Government* will be carried on by the *Usurper* and his *Adherents*, whether the *Lawful Prince* and his *Party* will or no; and then it is for the *Good* of the *Nation*, the *Lawful Party*, and the *Lawful Prince*, that *Justice* should be administered, and the *Order* of *Government* preserved, and consequently that the *Sentences* passed in Courts under the *Usurper*, and his *Commissions*, and *Grants*, &c. be looked upon as *valid*, as far as they are not against the *Right* of the *Lawful King*, and tend to the preservation of *publick Justice* and *Order*: For the allowing this does not imply,

1. An allowance of any *Right* or *Authority* in the *Usurper*; for the *Government* may still be conceived to subsist, and the *Laws* to stand in force, by virtue of the *Lawful King's Authority*; and consequently these *Judicial Acts*, &c. may be looked upon as *valid*, by virtue of his presumed *Will* whereby they are ratified and confirmed.

2. Neither does it justify the *Adherents* of the *Usurper*, in their joyning to act under him, as the *Instruments* of his *Usurped Power*; for this is *Treason* in them, their swearing *Allegiance* to him, taking *Commissions* from him, and acting for his *Interest* against their *Lawful Prince*; and yet some *Acts* done by them, to preserve *publick Justice* and *Order*, may be looked upon as *convenient*, not by virtue of any *Legal Authority* which they have, but as *Reason* and *Necessity* requires that these *Acts* should have their effect.

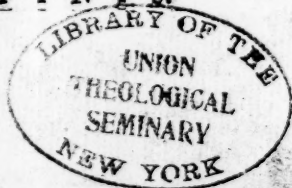
Thirdly, The Discourse, That some *Acts* against an *Usurper* may be punished as *Treason*: This also supposes the *Government* and *Power* of the *Nation* to be in the *Usurper's Hands*; and that it is requisite and just, that while it is so, *Murder*, *Robbery*, and such other

Offences

Offences against *Right* and *Order* be punished, though by the *Usurper's* Commission and Warrant. The same therefore is to be granted, as to any Acts within the *Stat. 25 Edw. 3.* which are committed under the Reign of an *Usurper*, against the Order of Government, and the Royal Authority considered in it self, and not against the *Usurper's* Person or Government as such; such are Clipping and Coining, betraying any place of strength to any Foreign Prince invading the Nation, not on the Lawful King's behalf, &c. Now these Acts may be allowed as punishable under an *Usurper*, without implying an allowance of any Authority in him; for they are punished by Virtue of the Lawful Prince's Authority, and without implying that the inferiour Magistrates under him have any Legal or Just Commission any farther, than as they may be conceived to have the Will and Consent of the absent Prince authorizing them to execute Justice upon such Criminals, or at least ratifying the thing done, though without a Legal Commission.

This I thought proper to add for the farther explanation of these Passages, to prevent their being mistaken or perverted. I have nothing more, but to desire that they may be considered as Concessions in relation to the Plea of *Bagot's Council*, which is so much insisted upon for the Lawfulness of transferring *Allegiance* to a *King de Facto*; and I have thought it the fairest way of answering the Argument from that Plea, not to reject it where it seems not to be unreasonable; but to shew that the Lawyers might have some reasonable grounds to argue in that manner for the validity of *Bagot's Patent*; and yet their Plea cannot be made use of, to prove that Allegiance is due to a *King in Possession*, if an *Usurper*.

F I N I S.



ERRATA

pag. 1. 1. 7. after *ibid* add *ibid*. p. 33. l. 12. for *var. r.* read
 l. 1. 7. for *ibid* r. *ibid*. Ibid. l. 9. for *l. r. ibid*. p. 41. l. 18. for
 r. *ibid*. p. 48. l. 22. for *read* r. *read*. Ibid. l. 24. for *l. r. ibid*
 l. 1. 22. Marg. for *Du. r. ibid*. p. 49. l. 7. Marg. for *Confiden*
Confiden. Ibid. l. 17. Marg. for *l. r.* Ibid. l. 22. for *l. r.*
 l. 1. 18. after *composita* add *ibid*. p. 54. l. 7. for
 l. 1. 23. for *l. r.*

